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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 299

ROOSEVELT RACEWAY, INC.,
Appellant,

vs.

GEORGE P. MONAGHAN, as Commissioner of Harness Racing and constituting the State Harness Racing Commission,
Appellee.

On Appeal From The Court Of Appeals Of The State of New York

JURISDICTIONAL STATEMENT

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On Appeal From The Court Of Appeals Of The State Of New York

JURISDICTIONAL STATEMENT

Appellant, Roosevelt Raceway, Inc., (hereinafter referred to as "Roosevelt") appeals from a final order of the Court of Appeals of the State of New York, dated and entered on March 23, 1961, reversing a final order of the Appellate Division of the Supreme Court of the State of New York, First Department, which had affirmed a final order of the Supreme Court of the State of New York, County of New York. Said final order of the Court of Appeals directed dismissal of Roosevelt's petition, on the merits.

OPINIONS BELOW

The court of original jurisdiction—the Supreme Court of the State of New York, County of New York—wrote an opinion which is reported in 22 Misc. 2d 776, 199 N. Y. S. 2d 195, and appears at pages 6-16 of the Transcript of the Record in this Court.*

The intermediate appellate New York State Court, the Appellate Division of the Supreme Court of the State of New York, First Department, affirmed by a vote of three to two. The opinion of the majority is reported in 11 A. D. 2d 206, 202 N. Y. S. 2d 646 (pp. 64-68) and the opinions of the minority are reported in 11 A. D. 2d 209, 219, 202 N. Y. S. 2d 649, 658 (pp. 69-89).

In the Court of Appeals of the State of New York (hereinafter referred to as the "Court of Appeals") there was a majority opinion (three judges concurring), a separate concurring opinion by a fourth judge and three separate dissenting opinions, all reported in 9 N. Y. 2d 293, 213 N. Y. S. 2d 729, 174 N. E. 2d 71. All the opinions in the Court of Appeals are appended hereto as Exhibit A.

JURISDICTION

(i) This case is a special proceeding brought by Roosevelt, on April 17, 1959, pursuant to Article 78 of the Civil Practice Act of the State of New York, to compel the New York State Harness Racing Commission (hereinafter referred to as "the Commission") to perform a contract created pursuant to Chapter 837 of the Laws of 1956 of the State of New York (hereinafter referred to as "the 1956 Law").

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* Hereinafter in this Jurisdictional Statement all arabic numbers preceded by the letter "p." or the letters "pp." in parenthesis refer to the pages of the Transcript of the Record on Appeal in this Court.

The 1956 Law promised Roosevelt, the owner and operator of a harness race track in Westbury, Long Island, New York,* and six other existing harness tracks** that each one which constructed a new plant or made other capital improvements, after securing the prior consent and approval of the Commission, would be permitted to retain a specified portion of the additional bets produced by the new plant (i.e., bets in excess of those required to yield the State the maximum taxes realized by it in the peak year at the old plant) until it had received an amount equal to the cost of its improvements, net after Federal income taxes.

The *quid pro quo* to the State was that it too would receive a portion of the additional bets produced at the improved track.

Roosevelt, in 1957, requested and obtained authorization from the Commission to construct a new plant and Roosevelt thereupon expended about $20,000,000 (half borrowed from banks) in the construction of a most modern track.

In 1959, the Legislature enacted a statute (Sections 7 and 10 of Chapter 881 of the Laws of 1959, hereinafter sometimes referred to as "the 1959 Law") which the Court of Appeals interpreted as having repealed Roosevelt's right to receive a portion of the amount promised to it by the 1956 Law.

The proceeding brought by Roosevelt was to enforce the contract created by the 1956 Law and the action taken pursuant thereto by Roosevelt and the Commission. Roosevelt urged that the 1959 Law impaired the obligation of its contract in violation of Article I, § 10 of the Constitution of the United States and deprived it of its property without

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* Roosevelt is a publicly-owned corporation with well over 11,000 stockholders and its securities are listed on a national exchange.

** Each harness track is publicly owned and has thousands of stockholders.

due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(ii) The final order and judgment of the Court of Appeals herein was dated March 23, 1961 and was entered on the same date in the office of the Clerk of said Court. A copy of said order is appended hereto as Exhibit B.

The notice of appeal herein was filed in the office of the County Clerk of New York County (who is also Clerk of the Supreme Court of the State of New York, County of New York, the Court possessed of the record herein) on June 16, 1961.

(iii) The jurisdiction of this Court to review the decision of the Court of Appeals herein by appeal is conferred by Title 28, United States Code, Section 1257(2). The Court of Appeals is the highest court of the State of New York and its order and judgment affirms the constitutionality of a New York statute enacted in 1959 which impairs the obligation of Roosevelt's contract in violation of Article I, § 10 of the Constitution of the United States and deprives Roosevelt of its property in violation of the Fourteenth Amendment to the Constitution of the United States.

(iv) The cases sustaining the jurisdiction of this Court include the following:

Chapter 837 of the Laws of 1956 of the State of New York and the action pursuant thereto by Roosevelt and the Commission created a contract between Roosevelt and the State of New York. See:

Russell v. *Sebastian*, 233 U. S. 195;
New York Electric Lines Co. v. *Empire City Subway Co.*, 235 U. S. 179;
People ex rel. N. Y. C. & H. R. R. R. Co. v. *Mealey*, 224 N. Y. 187, 120 N. E. 155, *affirmed* 254 U. S. 47.

Sections 7 and 10 of Chapter 881 of the Laws of 1959 of the State of New York, as construed and applied in this

case by the Court of Appeals to take away part of what had been promised by the State to Roosevelt, impair the obligation of said contract between Roosevelt and the State of New York and deprive Roosevelt of its property without due process of law*. See:

Puerto Rico v. *Russell & Co.*, 315 U. S. 610;
Stearns v. *Minnesota*, 179 U. S. 223;
Chicago M. & St. P. R. R. Co. v. *Wisconsin*, 238 U. S. 491;
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Murray v. *Charleston*, 96 U. S. 432 at 448;
American Smelting Co. v. *Colorado*, 204 U. S. 103;
Coombes v. *Getz*, 285 U. S. 434.

When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligations are Federal questions and finality cannot be accorded the views of a state court. See:

Irving Trust Co. v. *Day*, 314 U. S. 556;
New York Electric Lines Co. v. *Empire City Subway Co.*, 235 U. S. 179;
Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95.

STATUTES INVOLVED

Sections 7 and 10 of Chapter 881 of the Laws of 1959 of the State of New York, the validity of which under the Constitution of the United States is herein challenged by Roosevelt, may be found at pages 2250-2252 and 2253 of the

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* The final order of the Court of Appeals herein is a final judgment or decree under 28 U. S. C. § 1257(2) (*Department of Banking* v. *Pink*, 317 U. S. 264; *Cole* v. *Violette*, 319 U. S. 581) which this Court has jurisdiction to review on appeal because it sustains a state statute against a claim of its invalidity under the Constitution of the United States (*Scripto, Inc.* v. *Carson*, 362 U. S. 207; *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Ass'n.*, 360 U. S. 334).

official edition of the Laws of the State of New York, 182nd Session, 1959, volume 2. They read as follows:

§7. Subdivisions three, four and ten of section forty-five-a of such law, as added by chapter eight hundred thirty-seven of the laws of nineteen hundred fifty-six, are hereby amended to read as follows:*

3. (a) The provisions of section forty-five of this chapter shall apply to any future harness race track [until it has completed five calendar years of operation]. However, for each existing harness race track [and for each further harness track after it has completed five calendar years of operation,] the provisions of section forty-five-a shall apply instead of the provisions of such section forty-five until such time as payments to such harness race track from its construction account, made in accordance with subdivision ten of this section, shall equal the cost of capital improvements by said harness race track for which the harness racing commission prior to the effective date of this section as hereby amended, has made a determination pursuant to subdivision seven of this section that said capital improvements have been completed.**

(b) On and after the effective date of this section as hereby amended, the state harness racing commission shall issue no permits for capital improvements to be constructed under the provision of subdivision seven of this section and shall make no determinations as to completion pursuant to subdivision seven of this section with respect to any capital improvement for which no such determination had already been made prior to such date.

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* The 1956 Law is printed in full as Exhibit C hereto.

** EXPLANATION—Matter underlined is new; matter in brackets [ ] is old law to be omitted.

4. Every such harness race track for such period as the provisions of section forty-five-a shall apply to it shall distribute all sums deposited in any pari-mutuel pool to the holders of winning tickets therein provided such tickets be presented for payment before April first of the year following the year of their purchase, less fifteen per centum of the total deposits plus the breaks. Of the sum so retained in any calendar year, an amount equal to five per centum of the amount of the total daily pool not exceeding one hundred seventy-five thousand dollars, seven per centum of the amount of the total daily pool in excess of one hundred seventy-five thousand dollars but not in excess of three hundred thousand dollars, eight per centum of the amount of the total daily pool in excess of three hundred thousand dollars but not in excess of four hundred thousand dollars, nine per centum of the amount of the total daily pool in excess of four hundred thousand dollars but not in excess of five hundred thousand dollars, ten per centum of the amount of the total daily pool in excess of five hundred thousand dollars but not in excess of six hundred thousand dollars, and eleven per centum of the amount of the total daily pool in excess of six hundred thousand dollars plus fifty per centum of the amount of the breaks shall be paid by such harness race track to the state tax commission until the total of its payments to the state tax commission for the calendar year equals that proportion of its base tax as the number of days theretofore raced and to be raced thereafter in said calendar year bears to the number of days raced in the calendar year nineteen hundred fifty-five. The balance of such retained amount shall be disposed of as provided in subdivision five of this section.

10. The payment provided in paragraph (b) of subdivision six of this section to be made from the construction accounts to harness race tracks shall be made only to such a harness race track which completes one or more capital improvements with the approval of the state harness racing commission and then only from the date of the completion of any capital improvement with the approval of the state harness racing commission until such date as

the amounts paid to such harness race track from the construction account[, less income taxes paid thereon to the United States by such harness race track,] equals the cost of the capital improvement as determined by the state harness racing commission. No harness race track shall be reimbursed for any income taxes paid to the United States with respect to any payments heretofore or hereafter made to such harness race track from the construction account. The capital cost of improvements shall not be deemed to include interest on indebtedness, real estate taxes or insurance premiums. [In determining the amount of taxes paid by any such harness race track to the United States in any calendar year it shall be deemed that said amounts were taxed at the highest rates actually paid to the United States by such harness race track for the particular year involved.]

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§ 10. It is the intent of the legislature in hereby amending subdivision ten of section forty-five-a of the pari-mutuel revenue law, as added by chapter eight hundred thirty-seven of the laws of nineteen hundred fifty-six, to clarify what was its intent in relation to the reimbursement of any income taxes paid to the United States with respect to any payments made to any harness race track from a construction account, and it is the further intent of the legislature hereby to provide that no harness race track shall be reimbursed from the construction account for any income taxes paid by such harness race track to the United States, whether paid before or after the effective date of this section.

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QUESTIONS PRESENTED

Whether the 1959 Law, as construed and applied by the Court of Appeals herein, impairs the obligation of a contract between Roosevelt and the State of New York, in violation of Article I, § 10 of the Constitution of the United

States, and deprives Roosevelt of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. Pursuant to the authority provided by a 1939 amendment to the State Constitution, the New York State Legislature, in 1940, enacted Chapter 254 of the Laws of 1940 (the Pari-Mutuel Revenue Law), prescribing the method of lawful pari-mutuel betting.* Section 45 of the Pari-Mutuel Revenue Law provided that, out of each dollar wagered, the harness tracks should pay 85% (*i.e.*, 85 cents) to the winning bettors and retain 15% (*i.e.*, 15 cents) for their own purposes. This 15% constituted the tracks' receipts from bets. Said Section 45 required harness tracks to pay the State, out of their receipts from bets, *i.e.*, the 15% withheld from each bet, a special tax for the privilege of conducting pari-mutuel betting.**

The tax imposed in 1940 was an amount equal to 5% of each dollar wagered. Thus, in practical effect, out of each fifteen cents of receipts from bets the tracks retained 10 cents and paid 5 cents to the State as a tax. This rate of tax continued from 1940 to 1948.

In 1949 the State increased its tax, initiating a graduated system based on the volume of bets each day. The

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* "Pari-mutuel" is defined in Webster's New International Dictionary (2d ed. 1944) as:

> "A form of betting on horses in which those who bet on the winning horse share the total stakes, less a small percentage to the management."

** Harness tracks also pay all the other types of taxes imposed by New York State on corporations organized under its laws. They thus pay corporate franchise taxes (which are in effect taxes on their income from all sources such as admission fees, concession income, receipts from bets, etc.), admissions taxes, real estate taxes and other taxes.

State's tax ranged from 5% to 7% of each dollar wagered depending on the volume of bets on any one day. (L. 1949, c. 341). Inasmuch as the harness tracks continued to be authorized to withhold only 15 cents out of each dollar wagered, the practical effect of the 1949 change in tax rate was to reduce the tracks' net receipts from bets.

In 1954 (L. 1954, c. 513), the Legislature again increased its rate of tax without permitting the tracks to withhold more than 15% from each dollar bet. After this amendment, the tracks kept the following number of cents and paid the following tax (in cents) out of each 15 cents of receipts from bets (the figures in the last two columns refer to cents):

Out Of Each Dollar Bet Daily	*State*	*Track*
Up to $175,000	5	10
Over $175,000 but not over $300,000	7	8
Over $300,000 but not over $400,000	8	7
Over $400,000 but not over $500,000	9	6
Over $500,000 but not over $600,000	10	5
Over $600,000	11	4

Although the State's revenues from harness tracks for the privilege of conducting pari-mutuel betting reached their peak in 1955 due to the 1954 increase in tax rate, the Legislature realized that those revenues would not grow in the future unless something was done to induce the public to attend at the tracks in greater numbers. The Legislature realized this in 1956 because attendance and the amounts bet at harness tracks had remained relatively static in 1953, 1954 and 1955. The Legislature in 1956 also recognized that harness tracks would have to improve their plants and replace their obsolete accommodations with modern equipment if they wished to attract larger crowds. More people would normally bet a larger sum in total; and, of course, this would result in the tracks' paying more taxes to the State.

The Legislature in 1956 recognized that the tax rates initiated in 1954 had made it uneconomic for tracks to modernize and expand because even if improvements succeeded in increasing the amounts bet daily at the tracks, the amounts retained by the tracks from these additional bets, after paying taxes, would not be enough to overbalance the additional operating expenses of an enlarged track, much less to provide a return on the additional capital invested.

2. With this background, the Legislature enacted Chapter 837 of the Laws of 1956 wherein it set forth a new section of the Pari-Mutuel Revenue Law, numbered Section 45-a. The Legislature made the following findings in subdivision 1 thereof:

> "1. The Legislature hereby finds that the physical plant and capital structures of some of the harness race tracks in the state have become depreciated and inadequate for the proper conduct of harness horse race meetings; that, as a result, the number of admissions to harness horse race meetings in the state and the sums deposited in pari-mutuel pools therein have been limited and the state has lost substantial revenues and income which would accrue from increased admissions and the deposit of larger sums in pari-mutuel pools; and that enlargement and modernization of plant and structures of such tracks in this state would result in increased admissions and larger sums being deposited in pari-mutuel pools and would, therefore, redound to the financial benefit of the state and to the comfort, safety and convenience of its citizens. In order to remedy such situation and facilitate the enlargement and modernization of plant and structures in existing tracks and the construction of adequate and modern plant and structures in future tracks, this legislation is enacted."

The Legislature directed that the 1956 Law was to apply only to existing tracks, of which there were seven, Roosevelt being one of them (p. 41), and to an eighth track after it had been in operation for five years (Subdivision 3).

Under the Pari-Mutuel Revenue Law, there could be only eight tracks *in toto*. (Unconsolidated Laws, § 7597).

A copy of the 1956 Law is appended hereto as Exhibit C.

Subdivision 4 of the 1956 Law provided that each harness track which made a capital improvement with the approval of the Commission* was to retain, in each calendar year, the same 15 cents out of each dollar bet and to pay taxes for the privilege of conducting betting until the date in said year when the amount of said taxes received by the State from the track equalled the amount of taxes which the State had received from it in 1955 (after adjusting for differences, if any, between the number of racing days in 1955 and the year involved). Since taxes are paid every three days, it is relatively easy to determine when the amount thereof in any calendar year has equalled the total tax paid in 1955, *i.e.*, the base tax.**

Hereinafter, the bets at a track in any calendar year after the taxes paid by it to the State in that year have equalled its base tax are referred to as "the over 1955 bets". The bets at a track in any calendar year before the taxes paid by the track equal the base tax are sometimes referred to as "the under 1955 bets".

Subdivision 5(a) of the 1956 Law stipulated that out of each over 1955 bet the track was to deposit, in a bank account in its own name entitled a "construction account",

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* The Commission was permitted to grant such approval only if it found that the proposed improvement would ultimately add to the State's revenues, improve racing and promote the public welfare. The Commission also was required, after the improvement was completed, to make a finding as to its cost and the date of completion. See Subdivision 7 of the 1956 Law.

** The amount of taxes for the privilege of conducting pari-mutuel betting received by the State from a harness track in 1955 is referred to in the 1956 Law (Subdivision 2) and sometimes in this Jurisdictional Statement as the track's "base tax".

one-half of an amount determined by multiplying said over 1955 bets by the same graduated percentages as were applied theretofore in the year to the under 1955 bets in computing taxes and that the track, after depositing said one-half of the amount so determined in its own construction account, was to pay over the other half of said amount to the State as taxes.

The 1956 Law thus promised the tracks that they could deposit in their own bank accounts, called "construction accounts", a portion of the over 1955 bets produced at the new plant.*

But, and this is significant, the 1956 Law made no commitment with respect to taxes. It did not in any way bind the State in this regard.

Subdivision 10 of the 1956 Law provided that each capital improvement track was to have the right to continue to receive such construction account moneys until the total of all such construction account moneys retained by it equalled (i) the cost of the capital improvement as determined by the Commission, plus (ii) Federal income taxes paid by the track on such construction account moneys.**

In essence, therefore, the State in the 1956 Law, in order to induce the seven harness tracks of the State to enlarge and modernize their plants so as to produce larger amounts of bets than in 1955 when the State's revenues were at

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* These funds constitute the receipts of the track from its operations. See *Matter of Blaikie*, 11 A. D. 2d 196, 202 N. Y. S. 2d 659 (1st Dep't); cf. *United States* v. *Maryland Jockey Club*, 4 Cir., 210 F. 2d 367, certiorari denied 347 U. S. 1014; *Maryland Jockey Club* v. *United States*, 189 F. Supp. 70 (D. Md.), affirmed 4 Cir., 61-2 U. S. T. C. ¶9549.

** This feature of the 1956 Law recognizes that the tracks in making improvements expend after tax dollars and that, therefore, it is only fair to permit them to receive their costs, in after tax dollars, if the improved plants generate a sufficient amount of over 1955 bets.

their peak, promised each of said tracks that if it made a capital improvement, with the approval of the Commission, it would be allowed to retain a larger portion of the over 1955 bets produced by the improved plants than the under 1955 bets and that it could continue to do so until it had received an amount equal to its costs, as found by the Commission, net after Federal income taxes.

The Legislature, however, attached one further condition to the foregoing.

The Legislature desired to make certain that the State's total revenues from its tax for the privilege of conducting pari-mutuel betting at all the harness tracks in any year would not be less than the revenues which the State had received from all of them in the base year 1955. Inasmuch as some tracks hold races in the Spring, others in the Summer and still others in the Fall, the determination of whether the amount of the State's taxes from all tracks in any calendar year has equalled those of the base year, 1955, must await the end of the year involved. The Legislature, therefore, provided in the 1956 Law that moneys were to remain in each track's construction account until the end of each year and that if the State's taxes from all tracks at the end of any year proved to be less than the amount received by the State from all tracks in the base year 1955, each capital improvement track with moneys in its construction account was to make a *pro rata* payment therefrom to the State Tax Commission to make up the difference. Subdivision 6(a)(2) of the 1956 Law.

If a capital improvement track was not required to make such *pro rata* payment, it was to transfer the sums from its construction account to its general funds at the end of each year. Subdivision 6(b) of the 1956 Law.

The 1956 Law also stated, just as the Pari-Mutuel Revenue Law had always provided since its enactment in 1940 (Unconsolidated Laws, § 7603), that the moneys which a track is not required to pay to the Tax Commission may be held by the track for its own "use and purposes" and

that a tax is deemed levied when payment to the Tax Commission is required to be made. Subdivision 9 of the 1956 Law.

The 1956 Law further expressly stated in Subdivision 8:

> "Funds in a construction account shall be held by the harness race track not as public moneys but solely for the purpose of making the distribution as provided in this section."

3. Soon after the enactment of the 1956 Law, Roosevelt made application to the Commission for permission to construct capital improvements. Roosevelt informed the Commission, in its application, that it intended to pay for the proposed improvements by utilizing its own funds plus the proceeds of a $10,000,000 loan to be obtained from the Guaranty Trust Company, the Franklin National Bank of Franklin Square and the Meadow Brook National Bank. Roosevelt, in its said application, notified the Commission that it was relying on the benefits to be received under the 1956 Law as a source of funds to repay the loan (pp. 46-47).

Pursuant to Subdivision 7 of the 1956 Law, the Commission made a finding, after hearings, that Roosevelt's proposed capital improvements would add to the revenues of the State, improve racing and promote the welfare of the public and that they thus met the requirements of the 1956 Law. On the basis of these findings, the Commission, on June 5, 1956, issued a capital improvement license and construction permit to Roosevelt, conditioned upon the completion by Roosevelt of the capital improvements described in its application (p. 47).

Roosevelt thereupon borrowed $10,000,000 from the aforementioned banks and utilized those borrowed millions, and millions of its own, to construct the authorized improvements. The banks would not have loaned the funds and Roosevelt would not have constructed the improvements but for the provisions of the 1956 Law relating to Roosevelt's right to moneys in its construction accounts (pp. 47-48, 56).

Roosevelt completed the construction of its new plant on August 1, 1957. It thereupon made application to the Commission, pursuant to Subdivision 7 of the 1956 Law, for findings as to the date of completion of the improvements and the cost thereof. On December 23, 1957, the Commission found that Roosevelt had finished the authorized improvements on August 1, 1957 and that the actual cost of the construction was in excess of $19,500,000 (p. 48).

4. The State has received the *quid pro quo* for which it bargained in the 1956 Law. The 1956 Law has proved to be a bonanza to the State.

The Commission's own reports show that in the period from 1956 through 1960, the State received about $45,000,000 more in revenues (*i.e.*, from the over 1955 bets) from harness tracks than it would have garnered had there been no capital improvements and had its revenues continued at the 1955 rate. Those reports also show that in that same period the State received about $10,000,000 more in revenues from Roosevelt alone than it would have, had Roosevelt not made its capital improvements and had the State's revenues from Roosevelt continued at the 1955 rate.

That the 1956 Law has proved of great financial benefit to the State has been admitted—indeed boastfully proclaimed—by the Commission, the Appellee here. For example, the Commission's 1957 Annual Report, after referring to the tremendous increase in the State's revenues as a result of the first year of operations at Roosevelt's new track, stated at page 15:

> "This increase [in the State's revenues from Roosevelt] is a tribute to the wisdom and foresight of the Commission in supporting such legislation [the 1956 Law], not only from the standpoint of increased State revenue but also in furnishing the people of the State with modern up-to-date conveniences designed to protect their safety and comfort." [Words in brackets added]

5. In 1957, as authorized by the 1956 Law, Roosevelt received construction fund moneys in the sum of $2,858,495.38.

Roosevelt's income tax payments to the United States in 1958 for the year 1957 totaled $2,060,090.73. Included in that sum was $1,404,664.63, constituting the tax on the $2,858,495.38 received by Roosevelt from its construction account.* Roosevelt notified the Commission of said tax payment of $1,404,664.63 to the United States and demanded that the Commission, on its books, credit the balance to be retained by Roosevelt out of the construction account moneys generated by its new plant in the future with said amount of $1,404,664.63, in accordance with the provisions of Subdivision 10 of the 1956 Law (pp. 27-28).

Although the Commission had made provision in the past for the granting of credit for Federal income taxes paid on construction account moneys, it refused to comply with Roosevelt's said request (pp. 25-26).

6. Roosevelt instituted this proceeding in the Supreme Court of New York, on April 17, 1959.

The Commission moved to dismiss the petition in point of law on the ground that the Tax Commission, rather than the Commission, was the proper party respondent.

The Commission's said motion to dismiss was denied by the Supreme Court of New York (see 17 Misc. 2d 1065, 187 N. Y. S. 2d 659).

The Commission thereupon appealed to the Appellate Division, First Department, of the Supreme Court of the State of New York.

While this appeal was pending, Governor Rockefeller called an Extraordinary Session of the State Legislature

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* The Federal income tax on the $2,858,495.38 was computed after the deduction of the State taxes which were paid on said $2,858,495.38.

on July 1, 1959, which at his recommendation, in a one-day session, without hearings, enacted the 1959 Law.

The 1959 Law altered the language of Subdivision 10 of the 1956 Law as set forth above at pp. 6-8.

After the 1959 Law became effective, the Appellate Division, First Department, of the Supreme Court of New York unanimously affirmed the order denying the Commission's motion to dismiss, ruled that the Commission was the proper respondent herein and ordered it to answer the petition (see 9 A. D. 2d 621, 191 N. Y. S. 2d 362).

The Commission thereupon served its answer, asserting the 1959 Law as a defense to Roosevelt's petition. It alleged that under the 1959 Law Roosevelt was not entitled to receive construction fund moneys in an amount equal to Federal income taxes paid by it on such moneys.

Roosevelt served its reply raising the constitution questions now sought to be reviewed by this Court. The pertinent portion of Roosevelt's reply reads as follows (p. 55):

> "If the 1959 Law be construed to deprive Petitioner of its said contract right under the 1956 Law to receive payments from its construction account until the amounts paid to it therefrom less income taxes paid by it on such amounts to the United States equal the cost of its capital improvements as determined by the Commission, then the 1959 Law is null and void in that it impairs the obligations of Petitioner's contract and deprives Petitioner of its property without due process of law, all in violation of Article I, Section 10 and the Fourteenth Amendment of the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York."

Roosevelt thus raised the constitutional issue as to the validity of the 1959 Law at the earliest possible moment, *i.e.*, in its very first pleading following the one in which the Commission interposed the 1959 Law as a defense to Roosevelt's claim.

The matter thereupon came on to be heard on the pleadings, no issues of fact being involved, in the Supreme Court of the State of New York, County of New York, Special Term, Part I, before Markewich, J. Justice Markewich granted the relief prayed for by Roosevelt. In his opinion, he stated (22 Misc. 2d 776 at 781-2, 199 N. Y. S. 2d 195 at 201-2):

> "The 1956 law was a promise by the State to induce tracks to take action beneficial to both. The State made this promise to harness race tracks to induce them to modernize their plants in order that the State might obtain greater revenues from increased attendance and from its share of the larger sums which would be bet by the greater number of people who would attend. * * * In reliance upon the consideration promised by the 1956 law, petitioner built the authorized improvement, incurring debt, and expending many millions of dollars so to do. Finally, after petitioner had completed its new track, the commission made a finding, following the procedure set forth in the 1956 law, that the construction had been completed at a cost of over $19,500,000. Petitioner thus became entitled to recover moneys from the construction account in accordance with the terms of the 1956 law. A contract is created by action induced by or in reliance on State legislation. 'When the state through its legislature grants a * * * privilege * * * to a corporation either in the act incorporating it, or by other legislation followed by action of the corporation under or in reliance upon the grant so made, it constitutes a contract, based on a valuable consideration, the obligation of which cannot be impaired by subsequent legislation.' (*People ex rel. New York Cent. & H. R. R. R. Co.* v. *Mealey*, 224 N. Y. 187, 196-197, affd. 251 U. S. 47.)
>
> "By its investment of large sums and its erection of a new and greatly enlarged track pursuant to the 1956 law, petitioner accepted the State's offer that, if it made such a capital improvement, it would receive payments from the construction account until it had recovered its expenditures, net after taxes. Its right to receive such payments is protected against

subsequent revocation (*Russell* v. *Sebastian*, 223 U. S. 195; *New York Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179; *American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Danolds* v. *State of New York*, 89 N. Y. 36)."

The Appellate Division, First Department, as noted above, affirmed the order entered by Justice Markewich (11 A. D. 2d 206, 202 N. Y. S. 2d 646).

The Commission thereupon appealed to the Court of Appeals which, by a majority of four out of seven, three judges dissenting in separate opinions, reversed the Appellate Division and directed the dismissal of Roosevelt's petition.

The majority, per Fuld J., first held that the 1959 Law revoked Subdivision 10 of the 1956 Law insofar as it provided for the retention by capital improvement tracks of construction account moneys in an amount equal to Federal income taxes paid on such moneys. The majority opinion then further ruled that the 1959 Law in so amending the 1956 Law did not, in violation of the Constitution, impair a contractual obligation (U. S. Const., Art. I, § 10).

The majority's reasoning was that the 1956 Law "provided for a reduction in the State's tax or percentage of the betting pool and placed the difference in a 'construction account' ", that accordingly the contract created by the 1956 Law, to use Judge Fuld's language, was "a contract for tax relief—a promise by the State to keep the reduction enacted in the 1956 tax formula intact and unchanged until the track has been made whole, under that formula, out of revenues that would otherwise go to the State as taxes", and that such a contract was not protected against impairment by the Constitution of the United States because Article XVI, § 1 of the Constitution of the State of New York provides:

> "The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. . . .

> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes. . . ."

The majority held that the 1959 Legislature of the State was free under Art. XVI, § 1 of the State Constitution "to increase the tax obligations of the harness tracks either by raising the rates of existing taxes or by imposing new taxes."*

Judge Burke, in dissenting, stated (Appendix, Exhibit A, pp. 28a et seq.):

> "The 1956 legislative enactment contained provisions which when accepted as a basis of action by a track became a contract between it and the State which was constitutionally protected from impairment by subsequent legislation." (Appendix, Exhibit A, p. 28a)
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> • • •
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> "The law in appearance and substance has all the elements of a contract. An offer was addressed to a specific party and a promise made to that party that, if it was approved by the State and if it completed improvements which had to receive a State certification, it would be reimbursed. In this case the elements of a contract are clearer than they were in *Russell* v. *Sebastian* (233 U. S. 195). . . . " (Appendix, Exhibit A, p. 29a)
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> • • •
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> "In these similar circumstances, the consent and certification obtained by the respondent from the State acting by the Commissioner pursuant to the 1956 law has the same legal effect of establishing respondent's contractual rights. The 1956 law was not addressed indiscriminately to a large group of corporations. The State offer in the 1956 law was addressed only to those of the seven licensed harness

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* It will be shown, *infra*, that the Legislature did not raise rates or impose new taxes. What the Legislature did was to deprive capital improvement tracks of the promised extra portion of the over 1955 bets in an amount equal to Federal income taxes paid on the construction account moneys.

race tracks of this State which, with the approval of the Commission, completed improvements. Thus the 1956 law singled out the persons to receive rights thereunder by the performance of certain acts. Under the 1956 law not only was the consideration to be received by the track closely related to what was done by it for the State, but the approval of the construction of capital improvements by a State agency, the Commission, was required before a track could qualify to receive such consideration. . . . " (Appendix, Exhibit A, p. 30a)

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"The Legislature did not promise lesser taxes, what the State did was to promise the tracks that they would be reimbursed for the cost of the capital improvements out of a portion of the moneys withheld from the over-1955 bets which, if it materialized, obviously was money which had never been subject to the existing tax schedule...." (Appendix, Exhibit A, p. 31a)

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"Where, however, the State's bargain provides that the maximum amount of the construction account moneys which may be retained by a capital improvement track in any one year in reimbursement for its improvement costs shall be exactly equal to the additional amount over the base tax which a track pays the State in that year, the State has specifically invited a *quid pro quo.* It has not granted a tax exemption. (Appendix, Exhibit A, p. 32a)

• • •

"The 1959 law did not, as appellant would have us believe, impose a tax. It makes no attempt to exercise the taxing power. It seeks to change the promise made by the 1956 Legislature to the capital improvement tracks that, if they qualified for construction moneys by investing their own money and completing improvements found by the Commission to be such as 'will ultimately add to the revenues of the State', the tracks would be reimbursed *for the full cost to the tracks* of the improvements from moneys withheld from the over-1955 bets (see Pari-Mutuel Revenue Law, § 40). This promise recognized that each dollar of income of the tracks out of the portion of the over-1955 bets would not be sufficient, for instance, to repay a dollar of a bank loan

used to pay for the construction. Hence, an allowance, in equity, had to be made for the income tax imposed on each dollar of earnings. The 1959 legislation did not raise the rate of existing taxes or impose new taxes. It does try to rewrite a contract. . . ." (Appendix, Exhibit A, pp. 32a-33a)

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"The 1959 statute is, therefore, invalid, breaching what is under all these circumstances not a general tax statute, but the terms of a contract offered to a small group of tracks in whose business the State has an unusually large interest, and which exist by State license only, and on the faith of which this respondent borrowed and expended large sums for capital improvement approved by the State itself (U. S. Const., art. I, § 10; *Danolds* v. *State of New York*, 89 N. Y. 36, 45; *New York Elec. Lines* v. *Empire City Subway*, 235 U. S. 179, *supra*; *Russell* v. *Sebastian*, 233 U. S. 195, *supra*; *American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Brooklyn Bus Corp.* v. *City of New York*, 274 N. Y. 140). 'When the state through its legislature grants a franchise, privilege or exemption to a corporation either in the act incorporating it, or by other legislation followed by action of the corporation under or in reliance upon the grant so made, it constitutes a contract, based on a valuable consideration, the obligation of which cannot be impaired by subsequent legislation.' (*People ex rel. New York Cent. & H. R. R. R. Co.* v. *Mealey*, 224 N. Y. 187, 196-197, affd. 254 U. S. 47.) That rule is directly applicable here. The principle—that subsequent legislation cannot take away rights promised by prior legislation, especially after the promisee has acted in reliance upon the promise—protects respondent. Legislation by the State which violates section 10 of article I of the United States Constitution is violative of the due process clause of section 6 of article I of the State Constitution (*Central Sav. Bank* v. *City of New York*, 280 N. Y. 9, cert. denied 306 U. S. 661)." (Appendix, Exhibit A, pp. 33a-34a)

Chief Judge Desmond dissented in a separate opinion in which he stated, among other things, (Appendix, Exhibit A, pp. 21a, 23a):

"I concur with Judge Burke for affirmance. The 1959 statute as interpreted and upheld by this court

is an unconstitutional impairment of petitioner's contractual rights (U. S. Const. art. I, § 10)."

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"If this 1956 statute and petitioner's action in reliance thereon did not constitute an inviolable contract, it must be because the courts are abolishing an ancient rule of constitutional law which was founded on good morals and fair play and which has heretofore forbade the State's breaching such contracts."

Judge Froessel dissented in part (Appendix, Exhibit A, pp. 18a-21a). He said that the 1959 Legislature could not retroactively deprive Roosevelt of its right to receive construction account moneys in an amount equal to Federal income taxes previously paid.

THE QUESTIONS ARE SUBSTANTIAL

The close division of the members of the Court of Appeals and the dissenting opinions, quoted above, indicate the substantial character of the constitutional questions here presented. See *Louisville & N. R. R. Co.* v. *Melton*, 218 U. S. 36, 49. This is likewise indicated by the fact that the lower courts agreed with the minority of the Court of Appeals.

The 1956 Law made an offer to Roosevelt* that if it built a capital improvement with the prior approval of the State's agency, the Commission, it would receive a specified *quid pro quo*. A contract was created when Roosevelt took the required action with Commission approval. The decisions of the Court of Appeals and of this Court so hold. In *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Mealey*, 224 N. Y. 187, 120 N. E. 155, affirmed by this Court 254 U. S.

* The offer was made, of course, to each of the seven existing tracks.

47, the Court of Appeals stated (224 N. Y. at 196-97, 120 N. E. at 158):

> "When the state through its legislature grants a . . . privilege . . . to a corporation either in the act incorporating it, or by other legislation followed by action of the corporation under or in reliance upon the grant so made, it constitutes a contract, based on a valuable consideration, the obligation of which cannot be impaired by subsequent legislation. [Cases cited omitted.]"

See also, *Russell* v. *Sebastian*, 233 U. S. 195.

Indeed, the State's consent, through the Commission, to the making of Roosevelt's capital improvement clearly established the contract. See *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179. In that case, a statute authorized any electric company to construct lines of electrical conductors underground in any city, provided the company first obtained the consent of the common council of the city involved. The New York Electric Lines Company secured such consent from the Common Council of the City of New York. Mr. Justice Hughes stated (235 U. S. at 193):

> "These municipal consents are intended to afford the basis of enterprise with reciprocal advantages. . . . They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance."

The majority opinion in the Court of Appeals, per Fuld, J., in the cause at bar concedes that a contract between Roosevelt and the State came into being when Roosevelt completed its improvement, with Commission approval, but states that:

> " . . . the only contract which may be said to have been made is a contract for tax relief—a promise by the State to keep the reduction enacted in the 1956

> tax formula intact and unchanged until the track has been made whole, under that formula, out of revenues that would otherwise go to the State as taxes."

It is clear, of course, that this Court is not bound by Judge Fuld's view of the nature of the contract here involved (see *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561-62; *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, 186-7; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95) and it is submitted that Judge Fuld was clearly in error.

The only commitment made by the State under the 1956 Law was that a capital improvement track could continue to retain a small percentage of the over 1955 bets* until it had received an amount equal to the costs of the improvements plus Federal income taxes paid on the construction account moneys.

The State's commitment under this aspect of the 1956 Law was not different in nature than it would have been if the 1956 Law had provided that each capital improvement track could withhold a few cents in addition to the 15 cents from each dollar of the over 1955 bets, depositing those few extra cents in a construction account until it had received the aforementioned amount. It is quite evident that the State could not constitutionally revoke such a commitment. So here, it is submitted the State's agreement that each capital improvement track could retain a portion of the over 1955 bets could not be revoked by subsequent legislation.

Contrary to Judge Fuld's assertion, the 1956 Law, on its face, shows that the State made no commitment insofar as taxes were concerned. The State was left entirely free, subject to the Constitution of the United States, to impose any reasonable taxes it saw fit.

The State could have changed the tax rates at any time after the enactment of the 1956 law. For example, nothing

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* This percentage is one-half of the tax rate on the under 1955 bets.

in the 1956 Law prevented the Legislature from changing the rates in effect in 1956 (see p. 10, *supra*) to the following:

Out of Each Dollar Bet Daily	*State*	*Track*
Up to $175,000	5	10
Over $175,000 but not over $300,000	9	6
Over $300,000 but not over $400,000	11	4
Over $400,000	12	3

If the Legislature had done so, as it was free to do, capital improvement tracks would have had to pay entirely different and larger amounts by way of taxes for the privilege of conducting pari-mutuel betting than they were required to pay under the 1956 Law.

But the State in 1959 did not change tax rates—it totally deprived capital improvement tracks of moneys to be received by them under the 1956 Law.

In other words, the State in 1959 altered Roosevelt's contract—it took away precisely what had been promised, i.e., the right to keep construction account moneys in an amount equal to Federal income taxes paid on such moneys.

This Court has held that a governmental agency may not, even in the guise of taxation, change a contract. See *Puerto Rico* v. *Russell & Co.*, 315 U. S. 610. In that case, according to the majority of the Court, Puerto Rico had entered into a contract with plaintiff and other landowners whose lands had been deprived of water rights by an irrigation system created by Puerto Rico, whereby plaintiff and the other owners were to receive the delivery of an equivalent amount of water, free of expense. Thereafter, Puerto Rico imposed a special tax on the lands of plaintiff and those other owners in order to recoup the cost of the delivery of water. This Court held that said tax impaired the obligation of Puerto Rico's contract with plaintiff to deliver the water free of expense and that it violated the contract

clause of the organic law of Puerto Rico (which is comparable to the contract clause of the Constitution). The majority of this Court then said (315 U. S. 616, 619):

> "The assessment contemplated by Act No. 49 of 1921 is not a general tax laid for the support of government upon a property right or a franchise.
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> • • •
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> "And, in oral argument, counsel for petitioner frankly conceded that the money to be raised is not taxes in any way but merely an assessment against the respondent's land for the cost of delivering the water. If Puerto Rico had essayed to tax respondent's lands or its water rights by a general law, quite distinct questions would arise which we need not discuss."
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> "The history of the legislation shows that the proposed exaction was not a general tax but was an effort to collect from persons whose land was not in the irrigation system a portion of the expense of maintaining that system, whereas the contracts exempted them from contributing to such cost as a condition of receiving the stipulated amount of water from the system. This was a clear violation of the obligation of the contracts."*

So here, the 1959 Law was not a general tax. It was an effort to change the terms of a contract and to take away the capital improvement tracks' right to receive what had been specifically promised to them.

The principle involved was stated in *Murray* v. *Charleston*, 96 U. S. 432 at 448:

> ". . . no municipality of a State can, by its own ordinances, under the guise of taxation, relieve itself

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* The dissenting opinion in this Court in *Puerto Rico* v. *Russell & Co.*, disagreed only with the majority's interpretation of the contracts between the landowners and Puerto Rico. The dissenting opinion contended that those contracts did not provide for the delivery of water free of expense to the landowners and, therefore, that Puerto Rico's act in requiring them, in effect, to pay the expense of delivery did not violate their contracts.

from performing to the letter all that it has expressly promised. . . ."

Article XVI, Section 1 of the Constitution of the State of New York has no impact here. That Section merely preserves the right of the State to tax and prevents the impairment of that right by contract.

Roosevelt does not claim that the power of the State to tax was impaired by the 1956 Law. As noted, Roosevelt claims that the 1956 Law did not limit the State's power to tax. Roosevelt's position, however, is that the 1959 Law was not a tax but an effort by the State to change its commitment which, as noted above, it had no right to do.

That Article XVI, Section 1 of the Constitution of the State of New York does not validate what was here attempted by the 1959 Law is established by *Stearns* v. *Minnesota*, 179 U. S. 223. That case involved a contract between Minnesota and a railroad which provided that the railroad was to pay taxes of 3% of its gross earnings in lieu of taxes on all its railroad properties, including its lands. This contract was subject to the power reserved by Minnesota in its constitution to repeal, alter and amend taxes.

Minnesota thereafter enacted a statute taxing the lands of the railroad which were not used for railroad purposes, and at the same time continued to impose the 3% gross earnings tax. This Court held that while Minnesota had the right under its reserve power to impose taxes on the railroad, it could not, in the guise of exercising the taxing power, require the railroad to live up to its contract obligation to pay 3% in lieu of all taxes and at the same time change the railroad's right under that same contract to have its land exempt from taxation. In other words, Minnesota's reserved power did not authorize it to change a contract to its own advantage.

So in the case at bar, while New York, under Article XVI, Section 1, of its Constitution, reserved the right to

impose reasonable taxes, it could not, in the guise of the exercise of that power, change commitments under a contract while continuing to enjoy benefits under that same contract.

In other words, the State while it continued to receive its *quid pro quo* under the 1956 Law had no right to change the commitment that capital improvement tracks could receive an extra portion of the over 1955 bets.

Chicago M. & St. P. R. R. Co. v. *Wisconsin*, 238 U. S. 491, is also apposite because it shows that even though a state reserves the power to amend or alter a contract, it may not exercise that reserved power to destroy the obligation of the state, which is what the State of New York here has sought to do.

The judgment below is also in conflict with the decision of this Court in *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103. A Colorado statute provided that any foreign corporation could apply to the Colorado Secretary of State for leave to transact business in Colorado by paying a franchise fee and filing certain papers, and that, upon the issuance by the Secretary of State of a certificate that said conditions had been satisfied, the foreign corporation would become entitled to do business in Colorado upon the same terms and conditions as Colorado corporations. The American Smelting Company, a New Jersey corporation, complied with the provisions of that statute and obtained such a certificate from the Secretary of State. This Court stated (204 U. S. at 112-113):

> "These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required and received its permit, amounted to a contract. . . ."

After the American Smelting Company had been doing business in Colorado for three years, the Colorado Legislature passed a law taxing all foreign corporations (including the American Smelting Company) twice as much as domestic corporations.

The Supreme Court of Colorado rejected American Smelting Company's argument that the later statute was an impairment of the obligation of its contract, in violation of Article I, § 10 of the United States Constitution. Among the grounds for its decision advanced by the state Supreme Court was that the Company

> " . . . cannot escape the license tax imposed by section 65, even though the filing fee statute expressly granted that exemption; for by section 9 of article 10 of our constitution the power to tax corporations and corporate property can never be relinquished or suspended." [Record on Appeal, p. 60]

That provision of the Colorado constitution provided:

> "The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended."

In this Court, Colorado relied on said provision of its constitution to support the decision below, arguing that its constitution prohibited "the legislature from making any contract of exemption with corporations" (see 204 U. S. at 110).

This Court answered that contention by stating (204 U. S. at 114):

> "Counsel for the State concedes that the corporation was admitted for a period of twenty years, but subject to the power of the State to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary, implication arising from the statute.
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> "This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. . . . This cannot be done while the right to remain exists. It is a violation of the obligation of an existing valid contract."

In the instant case, unlike the *American Smelting* case, there is not even a limitation on the State's right to tax. All we have here is a promise by the State to Roosevelt that it will be able to retain a specified extra portion of each 15 cents withheld from the over 1955 bets until the amount thereof equals the cost of its improvements, net after Federal income taxes.

The vested right to enforce a contractual obligation is, of course, protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as by the Contract Clause. *Coombes* v. *Getz*, 285 U. S. 434, 448.

It is, therefore, respectfully submitted that the judgment below is contrary to the decisions of this Court.

There is here involved an attempt by the State of New York to deprive Roosevelt and other capital improvement tracks and their tens of thousands of public stockholders of approximately $40,000,000* in capital construction moneys and to usurp these moneys for itself. Roosevelt's share in this $40,000,000 is almost $20,000,000.

New York State attempts to deprive the capital improvement tracks of these moneys, even though it has already received tremendous benefits from the improvements made by tracks pursuant to the 1956 Law and even though it will continue to do so in the future.

According to the Commission's own reports, the State has received about $45,000,000 more in revenues since 1956 than it would have garnered had there been no capital improvements. And, if betting and attendance at the improved plants continues even at the present figures, the State's benefits from the capital improvements in the future over the next ten years alone will exceed $100,000,000.

The case presents a substantial question not only because the judgment below is contrary to the decisions of

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* That this is the overall amount involved was stated by the Attorney-General in his brief in the Court of Appeals.

this Court and because Roosevelt and other tracks are being unconstitutionally deprived of many millions of dollars, but also because the Federal government and state governments are more and more making commitments to private citizens in order to encourage them to undertake business activity deemed desirable from the viewpoint of the public. In short, the problem here presented is one of public importance and likely to recur frequently.

CONCLUSION

It is respectfully submitted that plenary consideration of the constitutional issues involved should be granted by this Court.

Respectfully submitted,

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APPENDIX

Exhibit A

Majority, Concurring and Dissenting Opinions in the Court of Appeals of the State of New York

FULD, J. The Constitution of this State was amended in 1939 to permit such "pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government" (art. I, § 9). And, in 1940, the Legislature enacted the Pari-Mutuel Revenue Law authorizing several types of horse racing under State supervision (L. 1940, ch. 254). This statute placed harness racing, which is here involved, under the supervision of the State Harness Racing Commission and, in order to protect the public and to derive "reasonable revenue for the support of government", it provided in section 45 for the following division of the betting pool at each harness track: the holders of winning tickets were to share in 85% of the proceeds, while the operator of the track was to pay the State as a privilege tax about 5% and retain approximately 10% for itself. The tax is declared by the statute to be "for the privilege of conducting pari-mutuel betting on the races run at the harness horse race meetings". By amendments in 1949 and 1954, the measure of the tax, representing the State's portion of the 15% was increased and there was introduced a system of graduated tax rates.

In 1956, section 45-a was added to the Pari-Mutuel Revenue Law (L. 1956, ch. 837), and it is from this amendment that the present controversy stems. The section opens with a legislative finding that "the state has lost substantial revenues and income" as a result of the depreciation and inadequacy of the existing physical plant of some of the State's harness race tracks and that "enlargement and modernization of plant and structures of such tracks in this state would result in increased admissions and larger

sums being deposited in pari-mutuel pools". In order to accomplish the enlargement and modernization desired, section 45-a provided for a reduction in the State's tax or percentage of the betting pool and placed the difference in a "construction account" from which the tracks would be reimbursed for capital improvements.

More specifically, under section 45-a, the holders of the winning tickets at the tracks were to receive the same percentages of the betting pool as they had before, namely 85%, but the State's share of the pool was to be reduced by the application of the following formula: the tax was to continue to be calculated at the then existing rates and the State was to receive, from any given track, in any year, an amount equal to that paid by that track in the year 1955. Any tax above this "base tax" was then to be divided, half to be paid to the State and the other half to be deposited by the track in its own name in a so-called "construction account". Thus, in effect, 50% of the taxes due the State, above the amount it had collected in 1955, was to be segregated and placed into a construction account.

As to the use of the moneys thus placed in the construction accounts, subdivision 7 of section 45-a provided that any harness track might apply to the Harness Racing Commission for permission to make capital improvements. And subdivisions 6 (par. [b]) and 10 prescribed that, at the end of each year, a harness track which had completed a capital improvement with the approval of the Commission could transfer to its own general account the money in its construction account, "until such date as the amounts paid to such harness race track from the construction account, less income taxes paid thereon to the United States by such harness race track, equals the cost of the capital improvement". And, the statute went on to recite, "In determining the amount of taxes paid * * * in any calendar year it shall be deemed that said amounts were taxed at the highest rates actually paid to the United States by such harness race track for the particular year involved."

If, in any given year, the State's tax revenue from all tracks was less than in 1955, it was provided that each construction account was to be assessed a prorata share to make up the difference. Furthermore, if by the end of a given year no capital improvements had been made, or if the improvements made had already been paid for from its construction account, the balance in such account was to be paid to the State. Finally, it should be noted, actual reimbursement depended upon the consent of the Harness Racing Commission for, by one of its rules, all withdrawals from the construction fund accounts required its countersignature.

This statutory scheme remained intact, in all its essentials, until 1959. In that year, the Legislature, at the behest of the Governor who called a special session for the purpose, amended section 45-a so as to prohibit the approval, by the Harness Racing Commission, of any new capital expenditures thereunder (L. 1959, ch. 881, § 7). Although it made no change in the provisions of section 45-a under which each harness track would be reimbursed from the construction account for the cost of capital improvements already made, the 1959 enactment expressly provided that no harness track "shall be reimbursed" from the construction account "for any income taxes paid to the United States", whether paid before or after the effective date of the amendment (L. 1959, ch. 881, § 7, amdg. § 45-a, subd. 10; see, also, L. 1959, ch. 881, § 10).

With this review of the statutory background, we turn to the facts of this case. Roosevelt Raceway, Inc., applied for and received approval to make capital improvements under section 45-a and they were completed in 1957 at a cost of $19,605,281. The amount in its construction account for that year was $2,858,495, and that sum was transferred to its general account with the permission and countersignature of the Harness Racing Commission.

Thereafter, Roosevelt notified the Commission that receipt of such sum had resulted in a Federal income tax of

$1,404,665, and, accordingly, Roosevelt asked the Commission to note this amount in its records as a "credit" against future construction account funds. The Commission, relying upon an opinion of the Attorney-General, declined to do so and Roosevelt thereupon brought the present proceeding, pursuant to article 78 of the Civil Practice Act, to review the Commission's decision.

Although the proceeding was instituted before the 1959 amendment to section 45-a, it was not heard or decided until after its effective date. The order sought by Roosevelt was granted at Special Term and was affirmed by a divided Appellate Division (11 A D 2d 206). The appeal is in this court as of right.

The courts below were concerned principally with contentions, raised in a companion case which is not before us (*Matter of Blaikie*, 11 A D 2d 196; and see, for exposition of contrary views, dissenting opinions of STEVENS and VALENTE, JJ., in present case), that section 45-a violates several provisions of the New York State Constitution and is void in its entirety. We are pressed to place our decision upon such constitutional grounds and declare the statute "totally unconstitutional". It is, however, wise and settled policy to hold a statute unconstitutional "only as a last resort" (*Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555, affd. 344 U. S. 367; see, also, *Ashwander* v. *Valley Auth.*, 297 U. S. 288, 346, 347, per BRANDEIS, J., concurring) and, since we have concluded that Roosevelt's petition must be dismissed even if the serious constitutional questions presented by section 45-a were to be resolved in its favor, we do not now pass upon them.

In granting the relief sought by Roosevelt, the courts below rightly rejected the contention of the Attorney-General that the 1956 statute, properly construed, did not provide for inclusion of the Federal income tax in ascertaining and determining the amount of reimbursement. Payments to a harness track from the construction account are to be made, subdivision 10 of section 45-a provided before its

amendment in 1959, "until such date as the amounts paid to such harness race track * * *, less income taxes paid thereon to the United States by such harness race track, equals the cost of the capital improvement". And, in determining the amount of taxes paid, the statute further recited, "it shall be deemed that said amounts were taxed at the highest rates actually paid * * * for the particular year involved". There can, therefore, be no doubt that this provision required reimbursement for Federal income taxes paid by the tracks on the amounts received from their respective construction accounts for capital improvements. Even supposing a fanciful construction might be found whereby "less income taxes" could be taken to mean "ignoring income taxes", we could not overlook the fact that the Legislature provided that income taxes paid should be determined "at the highest rates actually paid". The specification of a method for determining the amount of income taxes precludes the possibility that reimbursement for taxes was not intended.

The formula provided in section 45-a was unquestionably designed to increase the profits of the track by reducing its State taxes—to the point where the track would retain out of the increased profits, after paying its income taxes on such profits, the total cost of the new facilities. To be sure, under present tax rates this requires payments amounting to approximately twice the cost of any capital improvement and also fails to take into account the tax benefits which the track realizes from depreciation of the new facilities. This consequence, unfair though it might seem, does not, however, warrant disregard of the clear and unequivocal terms of the statute.

Nor may these terms be disregarded, as suggested by the Attorney-General, on the ground that the Legislature in 1959 "clarified" the 1956 statute by declaring that section 45-a, as written and enacted in 1956, was not intended to provide for the reimbursement of Federal income taxes (L. 1959, ch. 881, § 10). We have often held that, if the

language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning. (See, e.g., *Meltzer* v. *Koenigsberg*, 302 N. Y. 523, 525; *Town of Putnam Valley* v. *Slutzky*, 283 N. Y. 334, 343; *McCluskey* v. *Cromwell*, 11 N. Y. 593, 601-602.) This principle is, of course, no less compelling because "the other means of interpretation" urged is a later so-called clarifying statute. The Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received. (See *City of New York* v. *Village of Lawrence*, 250 N. Y. 429, 447; *People ex rel Mutual Life Ins. Co.* v. *Board of Supervisors*, 16 N. Y. 424, 431-432).

As already noted, the Legislature, in addition to "clarifying" section 45-a, went on to provide in so many words that "No harness track shall be reimbursed for any income taxes paid to the United States" whether paid before or after the effective date of the amendment (L. 1959, ch. 881, §§ 7, 10). This independent and affirmative enactment stands on a different footing from the attempted "clarification" of the earlier (1956) law and calls for separate consideration.

Roosevelt argues that the amendment was not intended to apply to improvements previously authorized and already constructed. And, Roosevelt contends, such a reading of the 1959 statute is supported by reference to its legislative history. Be that as it may, the same principle which forbids "clarification" of the 1956 act, since the language of the latter is unambiguous, also forbids resort to legislative history to construe the equally unambiguous language of the 1959 enactment. The statute plainly provides that there shall be no reimbursement of income taxes "whether paid before or after the effective date of this section." Since, under the original section 45-a, no reimbursement can take place until after a capital improvement has been completed, the question of reimbursement for income taxes can arise only as to a completed project.

Accordingly, the reference made in the 1959 amendment to income taxes paid before the effective date of that amendment can relate only to projects, such as that of Roosevelt Raceway, completed prior to the effective date and not, as Roosevelt claims, to projects to be completed after the amendment became effective.

Any further doubt as to the Legislature's design as to this issue is entirely dispelled by the other provisions of the 1959 act. These forbid the Harness Racing Commission to issue any further permits for capital improvements or even to certify to the completion of capital improvements previously approved. The 1956 formula for the reimbursement of capital outlays and taxes can only continue to operate with respect to improvements completed and certified before the effective date of the 1959 amendment. This being so, it is clear that the legislative decree that no reimbursement for income taxes shall take place can only have been intended to cover improvements such as those involved in this case, those, that is, which were completed and certified prior to the effective date of the amendment. It is evident, therefore, that the construction urged by Roosevelt would render this provision meaningless.

Moreover, contrary to Roosevelt's contention, the legislative history (consisting almost entirely of statements attributed to the Governor) is not in conflict with the plain meaning of the statute itself. In discussing the proposed 1959 legislation, the Governor is reported to have said that the change "will not be unfair" because "the tracks will get what the lawmakers intended them to get". This statement merely echoed an earlier opinion by the Attorney-General, and anticipated the later declaration by the Legislature itself, that section 45-a as originally enacted was not intended to provide for income tax reimbursement (N. Y. Legis. Annual, 1959, pp. 381-382).

In short, then, the 1959 amendment to section 45-a was designed to increase the tax imposed upon the tracks by

providing, in essence, that reimbursement of expenditures incurred in making capital improvements would continue only until the cost of construction had been repaid and that there would be no reimbursement of, or credit for, Federal taxes.

Roosevelt insists, however, that the State was powerless to do this, that the amendment, insofar as it put an end to the State's obligation to reimburse for Federal taxes, represents an unconstitutional impairment of a contractual obligation (U. S. Const., art. I, § 10). It is not entirely clear what Roosevelt claims to be the content of the contract which it asserts the State made with it. In resisting the contention that section 45-a violates the constitutional requirements relating to public funds, Roosevelt denied that the State had undertaken to employ its revenues for the construction of harness tracks. This position, sustained by the courts below (*Matter of Blaikie*, 11 A D 2d 196, *supra*), was manifestly necessary to overcome the impact of constitutional prohibitions (N. Y. Const., art. VII, § 8; art. VII, § 7; art. V, § 1) and to entitle Roosevelt to any reimbursement whatsoever from the construction account.

But, if we accept this position for the purposes of the present litigation, involving solely reimbursement of Federal income taxes, the only contract which may be said to have been made is a contract for tax relief—a promise by the State to keep the reduction enacted in the 1956 tax formula intact and unchanged until the track has been made whole, under that formula, out of revenues that would otherwise go to the State as taxes. Such a contract, if not indeed void in its inception—and this is a question as to which we express no opinion—is at all times revocable by the State. This was proclaimed and established, beyond the power of the Legislature to alter, by section 1 of article XVI of our present Constitution; in so many words, it declares:

> "The power of taxation shall never be surrendered, suspended or contracted away, except as to

> securities issued for public purposes pursuant to law. • • •
>
> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, education or charitable purposes".

Just as the "reserved power" to amend corporate charters, found in section 1 of article X of our Constitution, "prevents the charter from becoming a contract between State and corporation protected from impairment by the [Federal] Constitution" (*Matter of Mount Sinai Hosp.*, 250 N. Y. 103, 110; see, also, *Beloff* v. *Consolidated Edison Co.*, 300 N. Y. 11, 19), so section 1 of article XVI of our Constitution "prevents" the 1956 legislative promise to reduce the harness track's taxes "from becoming a contract between State and corporation protected from impairment by the [Federal] Constitution." (Cf. *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47, 50, affg. *People ex rel. New York Cent. & H. R. R. R. Co.* v. *Mealey*, 224 N. Y. 187.) In other words, in view of the first sentence of section 1 of article XVI, the State may not be said to have breached any contract or agreement with Roosevelt to maintain its State tax at the level provided for in 1956 for the reason that no one was empowered to enter into such an agreement on behalf of the State.

Nor can it be assumed that, in undertaking capital improvements, Roosevelt and the other tracks relied on an assurance that they would receive the Federal tax reimbursement which the 1959 Legislature has denied them. Whatever assurance they derived from the 1956 act was necessarily coupled with the knowledge not only that the 1956 Legislature was powerless to bind its successors, but that rates and levels of taxation are the staples of each legislative session. (See Revised Record of Constitutional Convention of 1938, Vol. 2, p. 1127.) Roosevelt and the other tracks must be deemed to have acted in the light of

what the law presumes them to have known in this respect. And, since this is so, they can hardly urge that they undertook their capital improvements in consideration of an irrevocable promise or agreement that their taxes would continue to be computed in accordance with the formula set up by the 1956 Legislature and that such taxes would not thereafter be increased. (Cf. *People ex rel. Cooper Union* v. *Gass*, 190 N. Y. 323, 327-328, 330.)

Roosevelt attempts to avoid the constitutional mandate of section 1 of article XVI by focusing on its second paragraph—which affirms the Legislature's power to alter or repeal exemptions from tax—and denying that section 45-a represents a form of tax exemption within its meaning. It asserts that "It is difficult to see how it can be urged that [section 45-a] granted any tax exemption, when, by its very terms, it could only increase but could not decrease the State's revenues." The fact is that section 45-a provided that, in any given year, one half of any taxes due the State above the amount paid in 1955 would only become payable to the State *if* it were not paid over to the track as reimbursement of capital outlays and Federal taxation paid thereon. Although the tax money involved was only that above the amount collected in 1955, and although freedom from tax liability was made conditional, it is manifest that section 45-a "exempted" from taxation a certain portion of the track's income. (Cf. Redevelopment Companies Law, L. 1942, ch. 845, particularly § 26, as amd. by L. 1943, ch. 234.)

In the present case, Roosevelt would not be aided even if we were to accept its concept of tax exemption. Section 1 of article XVI separately prohibits any attempt to contract away the power of taxation unless sanctioned by the people themselves. (Cf., e.g., as to Housing, N. Y. Const., art. XVIII, § 2.) A contract for a pre-established limit on tax liability, whether it be considered as conferring "tax exemption" or "tax savings", or tax relief by any other label, is clearly barred by this sweeping prohibition.

(See *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47, 50, *supra.*) The 1959 Legislature was, therefore, free to increase the tax obligations of the harness tracks either by raising the rates of existing taxes or by imposing new taxes. There are limits on, as well as qualifications of, the power to tax, but these have not been disregarded. The asserted limit based on a contract with the State does not exist.

The Raceway places its chief reliance on *American Smelting Co.* v. *Colorado* (204 U. S. 103) in support of an argument that section 45-a did not represent a tax exemption. In that case, a foreign corporation was chartered in the State of Colorado under a statute subjecting the foreign corporation so chartered to "the liabilities, restrictions and duties which were or might thereafter be imposed upon domestic corporations of like character." Subsequently, Colorado enacted a statute imposing a higher rate of tax on foreign corporations than on domestic corporations. The Smelting Company refused to pay the higher tax and the State brought a proceeding which resulted in a forfeiture of its corporate charter. On review of the state court's decision, the United States Supreme Court struck down the tax statute on the ground that it "impaired the obligation of the contract existing between the corporation and the State" (204 U. S., at p. 115). In reaching this conclusion, the Court met the argument that the Constitution of Colorado had a provision prohibiting the Legislature from making any contract of tax exemption by stating that "This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation" (204 U. S., at p. 114).

We need not now consider whether this 1907 decision by a closely divided court represents current constitutional doctrine for, in any event, its bearing on the present case is remote. The statute in the *Smelting Co.* case was nothing more than an act authorizing the chartering of foreign corporations. It was not directed at effecting a change in the

Smelting Company's tax status, in giving it a certain tax advantage, but rather at providing that it should be treated, in all respects, like any other corporation. Here, however, the statute which the Raceway relies on was enacted for no other purpose than to stimulate the building of tracks by providing tax advantages. Section 45-a, unlike the statute involved in the *American Smelting Co.* case, is a tax statute, designed for the very purpose of relieving or reducing a tax burden, and, as such, it falls within the very purview of the limitations of section 1 of article XVI of the Constitution.

One further point remains to be considered. It is suggested that, despite the general validity of the 1959 amendment, it offends constitutional requirements to deny reimbursement to Roosevelt for the Federal income taxes which it paid before the 1959 statute was enacted. As the State tax in question is a privilege tax (*supra,* pp. 300-301), a retroactive change affecting Roosevelt's tax liability for years prior to 1959 might well be invalid. However, when considered in its context, the 1959 enactment will be seen to be entirely prospective in its operation.

A retroactive tax is one which is imposed on past transactions or for past periods. If the 1959 change in Roosevelt's tax liability were retroactive, it would require Roosevelt to return to the State money which it has already withdrawn from the construction account. The statute will not have such an effect. It will not require Roosevelt to pay in taxes for the years 1957 and 1958 a penny more than it has already paid under section 45-a before its amendment. Under the 1959 statute—the constitutionality of the 1956 act aside—all the moneys in its construction account for those years, which it has already received, it may retain.

Roosevelt has spent over $19,000,000 on capital improvements, and its construction account accumulates (at the 1957 rate) roughly $3,000,000 annually. The only difference which results from giving full effect to the 1959 amendment is that, when, as a result of its annual withdrawals from the

construction account, Roosevelt has received the entire amount which it spent for capital improvements—say, by 1965—its taxes thereafter will no longer be subject to reduction. This is a purely prospective change in the measure of the tax; to be sure, Roosevelt's tax for 1966 will then be higher than it would otherwise have been, but this is an exercise of the very power to alter and increase taxes which section 1 of article XVI has inviolably preserved.

The result might, perhaps, have been seen more clearly if the Legislature had said that there shall be no future reimbursement for any sum in excess of the amounts actually expended for capital improvements. This is what the Legislature did say, although in somewhat different words. Since the Legislature was free to make any prospective change in the measure of the tax imposed (N. Y. Const., art. XVI, § 1), it was free in 1959 to restore the 1954 tax rates in their entirety and ban any further reimbursement whether attributed to the payment of the Federal income taxes or the cost of the capital improvements themselves. This being so, we are unable to see any infirmity in the 1959 amendment that reimbursement shall cease when the full cost of the capital improvements shall have been repaid.

Since section 45-a, as originally enacted, was—quite apart from its constitutionality, which we are not considering on this appeal—subject to the power of the Legislature to alter or repeal it, and since the Legislature did validly alter it by its 1959 enactment, Roosevelt's rights must be determined in the light of its provisions. In view of the explicit declaration of the 1959 statute that no harness track may be reimbursed from the construction account for any income taxes paid to the United States, "whether paid before or after the effective date of this section", Roosevelt is not entitled to reimbursement for Federal taxes and its petition to compel the Commission to record a credit for such taxes must be dismissed.

The order of the Appellate Division should be reversed and the petition dismissed.

DYE, J. (concurring). I am in complete agreement with Judge FULD that the 1959 amendment (L. 1959, ch. 881) to section 45-a of the Pari-Mutuel Revenue Law (added by L. 1956, ch. 837, § 1) effectively excludes reimbursement to a race track operator for Federal taxes on the amounts received out of the so-called "construction account", and that the order appealed from should be reversed and the petition dismissed. However, I would go further and deal with the challenge aimed at the validity of the 1956 act as a whole.

I do not overlook the judicial policy noted by Judge FULD of avoiding constitutional issues whenever possible or that the respondents urge us not to reach the constitutional question, since it was not raised in the court below. However, the usual reasons for avoiding such an issue are not available here. There is no surprise. All the parties filing briefs have dealt with the matter exhaustively. It is before us—we may not ignore it. In fact, constitutionality is mentioned in all the opinions filed herewith. In any event, there are times when a court-made policy must yield. This is such a time, for we are faced with a problem and answer to which will affect the tax revenues of the State and incidentally its millions of taxpayers, all of whom, though unnamed, are interested parties (cf. *People ex rel. Unger* v. *Kennedy*, 207 N. Y. 533; *Palmer* v. *Board of Educ.*, 276 N. Y. 222). The avoidance of future, yet imminent, litigation is a major factor in my conclusion. The problem is basic, involving as it does the reach of constitutional safeguards surrounding the use of public funds.

When the People relaxed the long-standing constitutional ban against gambling by excepting pari-mutuel betting on horse races (N. Y. Const., art. I, § 9, Nov. 7, 1939), no change was made in other fundamental concepts imbedded in other sections of the Constitution, and which are pertinent to our present problem. In substance, these regulate and restrict the use of public funds. They were designed to put an end to the use of the credit or property

of the State for other than a public purpose, a mischief which in times past had become intolerable (2 Lincoln, Constitutional History of New York; 10 New York State Constitutional Convention Committee, 1938, Problems Relating to Taxation and Finance). No longer may the money or credit of the State be given or loaned to or in aid of any private corporation, association or private undertaking (N. Y. Const., art. VII, § 8). The power of taxation can never be surrendered, suspended or contracted away except for securities issued for public purposes pursuant to law (art. XVI, § 1). Every law which imposes or continues a tax shall distinctly state the tax and the object to which it is to be applied (art. III, § 22). Funds belonging to the State or under its control can only be paid out by legislative appropriation (art. VII, § 7) and even then only upon the audit of the Comptroller (art. V, § 1).

As matter of law and clear intendment the moneys set aside in the "construction account" are in any sense of the words "public funds". Concededly, they are derived from the 15% set aside from the pari-mutuel betting pool from which taxes due the State are to be paid (L. 1949, ch. 341; L. 1954, ch. 513; L. 1956, ch. 837, adding Pari-Mutuel Revenue Law, § 45-a) and are not available to the track operators until the total taxes paid by all of the tracks for a given year exceed the totals for 1955. In the meantime the State has all the indicia and attributes of beneficial ownership. The funds are set aside in a special account subject to periodic audit, and such moneys may not be removed from the jurisdiction of the State, be invaded for any purpose, or any part thereof used except for the purposes provided in subdivision 10 of the 1956 law, and then only upon the prior approval and direction of the State. The track's only interest in the "construction account" is to hold it subject to the State's direction—at best, it is a mere nominee. The contention to the contrary is without substance and may not be sustained in face of our prior rulings that "No exaction can be lawfully made of a citizen by way of tax, impost, or excise, except under the authority of the

legislature, and the product of such imposition is *public money.*" (*People ex rel. Einsfeld* v. *Murray*, 149 N. Y. 367, 374-375, quoted with approval in *Fox* v. *Mohawk & Hudson Riv. Humane Soc.*, 165 N. Y. 517, 523.)

Nor does the fact that the moneys have not yet made their way into the State Treasury change the public character of the fund. We long ago said that money "raised in any manner through the state as an exaction from the citizen by the taxing or licensing power of government", whether yet collected or not, constitutes public funds and may not be diverted for private use (*Fox* v. *Mohawk & Hudson Riv. Humane Soc.*, 165 N. Y. 517, 524, *supra;* cf. *Matter of Guiteras*, 122 Misc. 523, affd. 214 App. Div. 722).

In *Ayers* v. *Lawrence* (59 N. Y. 192, 198) we pointed out that "Municipal corporations seldom have property, *funds* or estates in possession *to be wasted or injured save the taxes collected or in process of collection* * * * The legislature have used several words for the sole purpose of embracing every right and interest which might need protection" (emphasis supplied). (Cf. *People* v. *Board of Educ.*, 269 App. Div. 456 [3d Dept.], per FOSTER, J.).

Again, in *Samuel Adler, Inc.* v. *Noyes* (285 N. Y. 34, 36) the plaintiff sought to recover a license fee, contending that title to the money remained in the plaintiff, and was not in the State, so that a suit in the Court of Claims would not be necessary. Our answer there is relevant here: "The fee paid by this plaintiff was absorbed into the general fund and had thereafter no severable character." (Cf. *Psaty* v. *Duryea*, 306 N. Y. 413.)

The petitioner, Roosevelt, is a private corporation, as are the other harness tracks in this State, organized for the purpose of making a profit for their shareholders. The fact that a portion of their income is paid to the State in the form of taxes in no way affects or changes that status. The "construction account" authorized by the 1956 enactment of section 45-a is, primarily, a carefully contrived device in aid of private enterprise.

In this State there are many individuals, associations and corporations who engage in business for profit and who pay taxes, but until now no one has assumed that this gives the State a proprietary interest in their undertaking justifying special treatment by way of tax exemption, or by direct subsidy.

We are told that the "construction account" serves a laudable purpose; that the State will be the ultimate beneficiary through increased tax revenue. Be that as it may, "However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation." (*People* v. *Westchester County Nat. Bank*, 231 N. Y. 465, 475.)

Subdivision 8 of section 45-a provides that the moneys in the "construction account shall be held * * * not as public moneys". This characterization neither inhibits nor prevents the court from reaching a contrary conclusion as matter of law. True, such labels frequently serve a useful purpose in ascertaining legislative intent. They may not, however, serve as a substitute for legislative power, which finds its source in the Constitution. If it were otherwise, the State would soon be divested of all its funds simply by labeling them as "private".

The petitioner's reliance on *United States* v. *Maryland Jockey Club* (210 F. 2d 367, cert. denied 347 U. S. 1014), involving income tax litigation, is misplaced, for several reasons. First, the court there expressly declined to rule on where title to the "construction fund" lay (*id.*, p. 371) basing its decision on other grounds. In view of our Constitution's prohibitions, we, of course, cannot avoid that question. It is noteworthy, though, that the race track operator in that litigation adopted the very position to which the instant petitioner so vehemently objects, that title to the fund vested in the State. Secondly, the court held that the moneys paid from the account were not taxable

to the track until received from the State (*id.*, p. 369). That decision is in no way helpful to the petitioner.

Whenever the People have undertaken to give money or property of the State to individuals, associations or private corporations they have invariably done it by constitutional means. For instance, when the bonus for veterans was urged by popular demand, they adopted section 18 of article VII, as was also the case in the elimination of railroad grade crossings (art. VII, § 14), as well as the authorization in respect to public housing (art. XVIII, § 2). I see no reason why such an orderly procedure should not be adopted in this instance.

Under this view of the case, it necessarily follows that the "construction account" may not be sustained in reliance on principles of contract law. In legal contemplation an unconstitutional legislative enactment is a nullity. It creates no rights, imposes no duties, protects no one and is no justification for conduct which is otherwise illegal. It is of no more effect that if it had not ben passed (*Matter of Long Sault Development Co.* v. *Kennedy*, 212 N. Y. 1, writ of error dsmd. 242 U. S. 272; *Van Antwerp* v. *State of New York*, 218 N. Y. 422; *Kesbec, Inc.*, v. *Taylor*, 253 App. Div. 353, mod. on other grounds 278 N. Y. 293, motion for rearg. denied 278 N. Y. 716; 16 C. J. S., Constitutional Law, § 101; 9 N. Y. Jur., Constitutional Law, § 259). Thus the State has breached no contractual obligation, nor has the track operator gained any rights that have been impaired (N .Y. Const., art. XVI, § 1).

For these reasons, I am satisfied that section 45-a, in its entirety, is constitutionally invalid.

Froessel, J. (dissenting for modification). I would modify the determination below for the reasons hereinafter stated. The facts and background of this litigation are adequately set forth in the opinion of Judge Fuld.

When the Constitution of this State was amended in 1939 to permit "pari-mutuel betting on horse races as may be

prescribed by the legislature", there was added to the provision this language: "from which the state shall derive a reasonable revenue for the support of government". It thus left to the Legislature the regulation of such betting and the "reasonable revenue" the State shall derive therefrom.

Because of the State's interest in increasing said revenue, and pursuant to the constitutional provision, the 1956 statute made certain findings as to the inadequacy of the plants and structures of harness race tracks in the State by reason of which the State had lost substantial income, and to remedy this situation chapter 837 of the laws of that year was enacted.

No one denies the right of the Legislature to fix the amount of tax payable to the State on the 15% portion of the betting pool withheld from the bettors. In view of the State's interest in increasing the amount it may derive from harness track racing, it surely had the right to reduce the rate of taxes from year to year so as to give the race track owners an opportunity to make needed capital improvements which would enhance State revenues. The State was quite willing in its own interest to give relief to the owners, but only to the extent of the cost of needed capital construction. No one could tell in advance how much that would be, and, therefore, a formula was worked out between the State and the track owners whereby the tax imposed was lowered, as the State had a perfect right to do. I see no difference whatsoever between lowering the rate of taxes by a fixed percentage and lowering it by this formula.

No provision of the Constitution impinges in the slightest upon this power to reduce these taxes by the formula adopted. When, therefore, the 1956 statute was enacted, the Legislature was acting entirely within its province. The formula as worked out by the 1956 legislation lowered the tax rate, instead of by a fixed percentage, by the cost of capital improvements (to the extent the moneys were available under the formula), "less income taxes paid thereon to the United States by such harness race track." The

language is crystal clear and the statute is entirely valid. This petitioner was entitled to the specific relief granted in subdivisions (1) and (2) of the second paragraph of Special Term's order.

It is established law, however, that one Legislature may not bind another. A subsequent Legislature is not precluded from modifying a policy of a previous Legislature. "With the Legislature resides the power and discretion to shape policy. This is so, even if, as claimed, one Legislature violently disagrees with its predecessor. * * * 'The power to enact necessarily implies the power to repeal, and one Legislature cannot be limited or bound by the actions of a previous one. Hence every Legislature may modify or abolish its predecessor's acts, unless restricted by the Constitution, and the wisdom of doing so is a matter of legislative discretion.' " (*Farrington* v. *Pinckney*, 1 N Y 2d 74, 82.)

A subsequent Legislature, therefore, had the right to increase the tax rate, and the 1959 Legislature did so by eliminating the words "less income taxes paid thereon to the United States by such harness race track". It purported to do so by way of clarification, but in my judgment the conclusion is inescapable that it is nothing more nor less than a plain amendment of the 1956 statute, and cannot be given retroactive operation. The 1956 enactment, being valid when adopted, continued to be valid until amended and, while the 1959 statute could amend the 1956 legislation, it could do so only prospectively.

Under the mandate of the preamended statute, the race track is regarded as having received reimbursement from the construction account for the year in question, not in the amount it actually received, but only in such amount less the amount of income tax paid thereon. This was a completed transaction for that year, and petitioner must be deemed to have received only the lesser amount. The subsequent Legislature in amending the statute could not retroactively declare that petitioner had received for the year in question more than the preamended statute de-

clared it to have received at that time. To have done so would have been an unlawful retroactive increase in taxes.

In light of the foregoing, there should be stricken the third subdivision of the second paragraph of Special Term's order that, as to the "future", petitioner should be credited with Federal income taxes paid by it on sums transferred after the enactment of the 1959 statute, and the orders below should be modified accordingly.

Chief Judge DESMOND (dissenting). I concur with Judge BURKE for affirmance. The 1959 statute as interpreted and upheld by this court is an unconstitutional impairment of petitioner's contractual rights (U. S. Const., art. I, § 10).

The opinions of Judges FULD and FROESSEL have narrowed the issues. Both assume the constitutionality of the 1956 statute. They agree that the 1959 statute is not a clarification but a change of the 1956 statute. The two opinions, however, give different grounds for holding the 1959 law valid.

Judge FULD says that any contract created by the 1956 statute could lawfully be revoked by later legislation under the provision of section 1 of article XVI of the State Constitution: "Exemptions may be altered or repealed".

Judge FROESSEL says that, since one Legislature cannot bind another, the 1959 modification was valid as a mere change of a tax formula.

Judge FULD's position is untenable unless the 1956 act was one for a tax "exemption". In my opinion it clearly was not. "Exemption from taxation" means immunity or freedom from tax (see Tax Law, § 4). It means the kind of "exemption" described in *City of Rochester* v. *Rochester Ry. Co.* (182 N. Y. 99, 113, and cases cited there). It is impossible to consider as granting a "tax exemption" the 1956 law which guaranteed that the State would get from petitioner taxes no lower than petitioner

had paid in 1955 and which reduced petitioner's taxes only when and if petitioner during any year paid taxes up to and beyond the 1955 level and then only if the amount of the reduction were applied by petitioner to an approved construction project which was intended to and did produce greatly increased taxes for the State. Nor, in any real or reasonable sense, did this violate our Constitution's prohibition (art. XVI, § 1) against the State's "surrendering" or "contracting away" its taxing power. The purpose and effect of this carefully worked out statutory scheme was to increase the State's tax receipts from harness tracks by means of increasing attendance and betting at the tracks.

Answering Judge FROESSEL's position, it cannot be literally true that "one Legislature cannot bind another" so as to create an irrevocable contract, otherwise there never would have been a *Trustees of Dartmouth Coll.* v. *Woodward* case (4 Wheat. [17 U. S.] 518). Contractual rights created by legislative charter or statute cannot be impaired unless the State has in advance reserved power so to impair them. There were no such reservations here.

As establishing that the 1956 statute created, when petitioner acted on it, a constitutionally irrevocable contract, I cite *People ex rel. New York Cent. & H. R. R. R. Co.* v. *Mealey* (224 N. Y. 187, 196-197, affd. *sub nom. Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47); *American Smelting Co.* v. *Colorado* (204 U. S. 103); *New York Elec. Lines* v. *Empire City Subway* (235 U. S. 179, 193); *People ex rel. Davis* v. *Sturtevant* (9 N. Y. 263, 273); *People* v. *O'Brien* (111 N. Y. 1); *Suburban R. T. Co.* v. *Mayor of City of New York* (128 N. Y. 510), and many other authorities.

Proof that the 1956 statutory plan was intended by the Legislature to create contractual rights is found in a provision inserted in 1956 and now part of the second sentence of section 40 of the Pari-Mutuel Revenue Law. Prior to 1956 the Harness Racing Commission was authorized to grant to a harness track corporation a license running for

not more than a calendar year. In 1956, when the "construction fund" provisions were added, the statute was amended to say that when the Commission approves a capital improvement it "shall, as a inducement for or in recognition of the making of such capital improvement, grant a capital improvement license, which may be conditioned on the completion of the capital improvement if not yet made" for a period of not more than 25 years but in no event for a period longer than is necessary to amortize any loan for a capital improvement, there being a further provision that such capital improvement license shall automatically expire when the loan of funds upon which it has been issued has been paid off by the licensee. This was an express recognition by the State of the possibility that a capital improvement might be paid for out of borrowings and a direction that the track should have a license to run until the loan should be paid off by tax savings made available to petitioner by the 1956 "construction fund" formula.

If this 1956 statute and petitioner's action in reliance thereon did not constitute an inviolable contract, it must be because the courts are abolishing an ancient rule of constitutional law which was founded on good morals and fair play and which has heretofore forbade the State's breaching such contracts.

I vote for affirmance.

Burke, J. (dissenting). The issues on this appeal involve determinations in regard to the nature and validity of the rights and obligations of the Raceway and the State of New York which stem from a relationship formed by them in connection with an enterprise undertaken by the Raceway pursuant to an amendment of the Pari-Mutuel Revenue Law enacted in 1956.

Until 1939 the Constitution of the State of New York prohibited gambling in this State. By a constitutional amendment, the Constitution was amended to except from the ban on gambling "pari mutuel betting on horse races

as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government".

The constitutional amendment thus delegated to the Legislature constitutional power to prescribe pari-mutuel betting with only one specific direction, viz., to raise therefrom a reasonable revenue.

Since its enactment in 1940 the Harness Horse Racing Act has required (Pari-Mutuel Revenue Law, § 45) that 85% of the pari-mutuel betting total be distributed to the holders of winning tickets. The remaining 15%, which has always been deposited in the corporation's own name in a bank of its own choosing in this State, constituted business income of the corporations operating the race tracks. Out of their 15% the corporations have been required by the statutes to pay certain percentages (graduated as to amounts and changed from time to time by amendments to the act) to the State "as a reasonable tax by the state for the privilege of conducting pari-mutuel betting". In 1956 the Legislature, recognizing that the then existing tax rates had made it uneconomic for tracks to modernize and expand (§ 45-a, subd. 1), and exercising a right delegated to it by the constitutional amendment, offered to reduce any of the then seven harness tracks' rate of taxes by providing, subject to certain conditions, that, as to betting receipts in any year in excess of the total for 1955, the tax rate should be reduced by one half.

The reduction effected by the 1956 law (Pari-Mutuel Revenue Law, § 45-a) was subjected as we said to two conditions subsequent: first, that it would not be available to any corporation unless and until the total taxes held by all the track operators for a given year exceeded the totals for 1955; and, second, that the harness racing corporation could receive the benefit of the reduction only if it expended amounts for capital improvements which were approved by the Racing Commissioner. Both those conditions were, of course, for the benefit of the State. Inasmuch as it was

impossible to determine until the end of each calendar year whether the amount of the State's taxes from all tracks equalled those of the base year 1955, as the tracks conduct their race meetings through the year, the new statute required that each corporation hold in a separate bank account in its own name till the end of the calendar year an amount equal to half the excess over 1955 levels of taxes at the old rate (§ 45-a, subd. 5, par. [a]). The 1956 law does not provide for the deposit of any part of the State's taxes in the special account. At the end of each year any such corporation which had completed improvement to the satisfaction of the Commissioner (if at that time the State's revenue from all tracks equalled that of 1955) was permitted to take over this bank account and to continue in each year when the revenue exceeded 1955 to do the same, until the amounts received by it from those special accounts, less Federal income taxes thereon, should equal the cost of the improvements. The moneys which a track is not required to pay to the Tax Commission was to be held for its own "use and purposes" and, unless and until the track is required to make a payment to the Tax Commission, no tax is levied (§ 45-a, subd. 9, par. [a]). Since the construction account funds were federally taxed income to the track corporation, the latter actually benefited to the extent only of the reduction amount net after Federal income taxes. Accordingly, the credit of construction account funds, which could be retained by the tracks, less Federal income taxes thereon, was to continue till the total therefrom equalled the cost of its improvement. In opinions given to the Legislature and the Governor, *the then Attorney-General* declared that the moneys in the construction account were not State moneys and that the bill as passed by the Legislature was constitutional.

Respondent thereafter in 1956-1957, with the approval of the Commission, expended $19,517,469.92. Ten million dollars was borrowed from banks. In three years respondent's new plant yielded over $7,000,000 more in taxes than the State had received at the 1955 level. When, however,

the respondent, pursuant to the law, sought the credit for the payment of Federal income taxes paid by it on the construction account moneys received by it, the Harness Racing Commission disallowed it in accordance with an opinion of a *new Attorney-General*, but continued to authorize the making of capital improvements.

In 1959, *after the commencement of this proceeding*, the State Legislature, at a one-day extraordinary session, attempted to cancel unilaterally the "income tax" provision of the 1956 law through a "clarifying" act (L. 1959, ch. 881, § 7, amdg. § 45-a, subd. 10; § 10) to the effect that the Legislature had not intended that the tracks should be "reimbursed" for income taxes and that thereafter there should be no such "reimbursements".

In the present proceeding we are concerned only with those construction moneys which according to both the laws *are not payable* to the Tax Commission but are to be retained by the tracks.

The courts below found that the 1956 law provided in clear and unambiguous language that the respondent is entitled to retain such construction account moneys until the amount thereof, less Federal income taxes paid by the track on such moneys, equals the cost of the improvements. The contention is now made that this interpretation ignores the "clarification" of the 1956 statute by the terms of the 1959 law which forbids the credit of income tax moneys. The respondent in its reply to the answer alleges that the 1959 law is ineffectual and, if it is construed to forbid such credits, is void.

The dispute between the Commission and the respondent concerned the interpretation of language in subdivsion 10 of the 1956 law that each capital improvement track should retain such construction account moneys in each calendar year in which the State's taxes *from the track and all tracks* equal those received by the State therefrom in 1955 "until such date as the amounts paid to such harness race

track from the construction account, *less income taxes paid thereon to the United States by such harness race track*, equals the cost of the capital improvement as determined by the state harness racing commission. The capital cost of improvements shall not be deemed to include interest on indebtedness, real estate taxes or insurance premiums. In determining the amount of taxes paid by any such harness race track to the United States in any calendar year it shall be deemed that said accounts were taxed at the highest rates actually paid to the United States by such harness race track for the particular year involved" (emphasis added).

In appellant's view the meaning of this provision would limit the respondent to the payment of such extra portion of the withheld moneys from the over-1955 bets only until the date when the amount of all moneys so retained by respondent from such extra portion equals the cost of its capital improvements.

The language of subdivision 10 of the 1956 law is plain and unequivocal and it does not mean what the Attorney-General stated it does. The Legislature has not used language which is difficult to understand. The provisions as to income taxes meant exactly what it said: that the track could continue to use its construction fund to pay for the improvements until the total dollars recaptured, less income taxes, was equal to the total in dollars expended for the improvements. In other words, the reimbursement was not to cease until the *full cost of the capital improvements to the tracks shall have been repaid*. This full cost was not just the amount in dollars expended for capital improvements, but that amount plus the income taxes paid at the time of the acquisition of the dollars needed to pay the construction or to repay the banks for the loans necessary for the completion of the project.

Such a construction of the statute, it is argued, is in conflict with the terms of the 1959 law which is said to be either a clarification or amendment of the earlier statute. The purported clarification of the 1956 statute even if it

could be deemed valid cannot be given retroactively the effect expressed by the Attorney-General (*City of New York* v. *Village of Lawrence*, 250 N. Y. 429; *People ex rel. Mutual Life Ins. Co.* v. *Board of Supervisors*, 16 N. Y. 424, 431, 432). Since the language of the statute is plain, and the intent clear, there is no power in the Legislature to impose on the courts its interpretation which in the guise of a clarification is set forth in the later statute. The excising of language from the 1956 law and the insertion of provisions in the 1959 law which radically changed the prior legislation, the language of which was perfectly clear, can hardly be characterized as a clarification. *People ex rel. Westchester Fire Ins. Co.* v. *Davenport* (91 N. Y. 574, 592) and *Matter of Chatlos* v. *McGoldrick* (302 N. Y. 380) do not assist the appellant. In those cases the clarifying amendment did not change unambiguous language of the original statute in order to cut out a purpose clearly expressed in the original statute.

If, moreover, the 1959 statute is regarded as involving a prospective change of respondent's rights under the 1956 statute, it would be invalid as it represents an unconstitutional impairment of the State's contractual obligation.

The 1956 legislative enactment contained provisions which when accepted as a basis of action by a track became a contract between it and the State which was constitutionally protected from impairment by subsequent legislation.

In *New Jersey* v. *Yard* (95 U. S. 104) the Supreme Court said (p. 114):

"The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point;

and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions.

"These doubts are increased when the terms of the statute relate to a matter which is in its essential nature one of exclusive legislative cognizance, and which at the same time required money or labor to be expended by individuals or corporations. In such cases, the legislature may be supposed to be merely exercising its power of regulating the burdens which are to be borne for the public service, in which case it could be modified from time to time as legislative discretion might determine; or it might be a contract founded on a fair consideration moving from the party concerned to the State, and which in that case would be beyond the power of the State to impair."

Any doubts that the undertaking joined in by the State and the respondent under the terms of the 1956 statute was contractual in nature are dissipated by the acknowledgment by the 1959 Legislature that an obligation subsisted for the reimbursement of the cost of the capital improvements borne by the tracks. The 1959 Legislature did not repudiate the obligation, it reaffirmed it. Capital improvement tracks would not be "entitled" to reimbursements unless a legal obligation binding on the State had been created by the 1956 law. The 1959 legislation confirms a conclusion that the 1956 legislation was not a general tax statute. The law in appearance and substance has all the elements of a contract. An offer was addressed to a specific party and a promise made to that party that, if it was approved by the State and if it completed improvements which had to receive a State certification, it would be reimbursed. In this case the elements of a contract are clearer than they were in *Russell* v. *Sebastian* (233 U. S. 195) and *New York Elec. Lines* v. *Empire City Subway* (235 U. S. 179). In *Russell* (*supra*) the gas company prevailed in its contention that its commencement of a pipeline construction gave rise to a contractual right. Here, respondent's construction of a capital

improvement at a cost of $19,000,000 under the 1956 law has been fully completed. In *New York Elec. Lines* (*supra*) Mr. Justice HUGHES stated (p. 193): "These municipal consents are intended to afford the basis of enterprise with reciprocal advantages. * * * They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance."

In these similar circumstances, the consent and certification obtained by the respondent from the State acting by the Commissioner pursuant to the 1956 law has the same legal effect of establishing respondent's contractual rights. The 1956 law was not addressed indiscriminately to a large group of corporations. The State offer in the 1956 law was addressed only to those of the seven licensed harness race tracks of this State which, with the approval of the Commission, completed improvements. Thus the 1956 law singled out the persons to receive rights thereunder by the performance of certain acts. Under the 1956 law not only was the consideration to be received by the track closely related to what was done by it for the State, but the approval of the construction of capital improvements by a State agency, the Commission, was required before a track could qualify to receive such consideration. Paragraphs (a) (cl. [1]) and (b) of subdivision 6 of the 1956 law show that legal obligations were being imposed on the State. In those provisions the 1956 Legislature has stated that capital improvement tracks are "entitled" to their construction account moneys.

Wisconsin & Michigan Ry. Co. v. *Powers* (191 U. S. 379), *People ex rel. Gallatin Nat. Bank* v. *Commissioners* (67 N. Y. 516) and *People* v. *Roper* (35 N. Y. 629) are not applicable under circumstances comparable to those here present. In this instance the terms of the 1956 law and the circumstances surrounding its enactment evidence a purpose on the part of the Legislature to bargain with the track for a fair consideration for the benefit of the State of New York.

Section 1 of article XVI of New York State Constitution which authorizes the Legislature to repeal tax exemptions and the deliberations of the 1938 Constitutional Convention which were directed to *tax exemptions* such as that which had been granted to the owner of the land under the Chrysler Building in New York City are equally irrelevant. "The question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. (*Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100.) In any event, appellant's interpretation of the law is inadmissible. The argument in support of the validity of the 1959 amendment of the 1956 law assumes (contrary to a legislative finding that the State prior to its enactment had "lost substantial revenues and income" because of the limited facilities of the tracks) that section 45-a, added by the 1956 law, had the effect of *relieving the race tracks from a given portion of tax they otherwise would have had to pay under the then existing tax schedules* and, as such, it was a tax exemption. The assumption is, of course baseless. The then existing tax schedules applied to the "inadequate" tracks at which " the number of admissions" and "the sums deposited in pari-mutuel pools" were limited to the detriment of the State revenues. A track cannot under section 45-a reduce its taxes by making improvements. On the contrary, the track by making improvements creates the possibility that it will have to pay additional, not less, taxes. The Legislature did not promise lesser taxes, what the State did was to promise the tracks they they would be reimbursed for the cost of the capital improvements out of a portion of the moneys withheld from the over-1955 bets which, if it materialized, obviously was money which had never been subject to the existing tax schedule. Indeed, there is no language in the 1956 law which promises tax exemption to the tracks or yields a taxing power. Under the 1956 law the State was left free to raise its rate of tax in the future. The fact that the 1956 law provides for the retention by capital improvement tracks of a portion of the moneys withheld from the over-

1955 bets cannot be regarded as tax exemption. What was accomplished was an adjustment in tax rates which the Legislature could have made unconditionally but for which it chose to bargain and attach conditions so as to assure the State benefits through increased betting at improved, larger race tracks. Where there is an unconditional reduction the Legislature is free to alter the rates. Where, however, the State's bargain provides that the maximum amount of the construction account moneys which may be retained by a capital improvement track in any one year in reimbursement for its improvement costs shall be exactly equal to the additional amount over the base tax which a track pays the State in that year, the State has specifically invited a *quid pro quo*. It has not granted a tax exemption.

In *Indiana ex rel. Anderson* v. *Brand* (303 U. S. 95, 100, *supra*) the court described such an arrangement in this manner: "If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect to public business for a term longer than the life of the current session of the legislature."

The 1939 pari-mutuel amendment to the State Constitution (art. I, § 9) specifically vested the Legislature with power to do what it deemed desirable in order to raise revenue from pari-mutuel betting. It thereby empowered the Legislature to contract with the tracks as it did pursuant to the 1956 law. This contract, unlike a tax exemption, was intended to and did produce more revenue for the State. By its terms it could only increase but could not decrease the State's revenue. Section 1 of article XVI of the New York State Constitution is not, therefore, applicable.

The 1959 law did not, as appellant would have us believe, impose a tax. It makes no attempt to exercise the taxing power. It seeks to change the promise made by the 1956 Legislature to the capital improvement tracks that, if they qualified for construction moneys by investing their own money and completing improvements founded by the Commission to be such as "will ultimately add to the revenues

of the State", the tracks would be reimbursed *for the full cost to the tracks* of the improvements from moneys withheld from the over-1955 bets (see Pari-Mutuel Revenue Law, § 40). This promise recognized that each dollar of income of the tracks out of the portion of the over-1955 bets would not be sufficient, for instance, to repay a dollar of a bank loan used to pay for the construction. Hence, an allowance, in equity, had to be made for the income tax imposed on each dollar of earnings. The 1959 legislation did not raise the rate of existing taxes or impose new taxes. It does try to rewrite a contract. This alteration in the terms of the contract would authorize the State, after accepting the benefits of respondent's investment, to pay the acknowledged debt in a "coin" different in kind to the "coin" the respondent had expended and the "coin" which the State specifically stipulated would be restored. In brief, the State, which had agreed that the respondent would be repaid in full dollars, unilaterally decreed, in effect, that it would be charged with full dollars but repaid in half dollars. According to the reasoning of the appellant the amendment could have validly required the respondent to accept worthless currency for the discharge of an obligation the existence of which the 1959 law affirmed. Such a change in the consideration is manifestly an unconstitutional impairment of a legislative agreement.

The 1959 statute is, therefore, invalid, breaching what is under all these circumstances not a general tax statute, but the terms of a contract offered to a small group of tracks in whose business the State has an unusually large interest, and which exist by State license only, and on the faith of which this respondent borrowed and expended large sums for capital improvement approved by the State itself (U. S. Const., art. I, § 10; *Danolds* v. *State of New York*, 89 N. Y. 36, 45; *New York Elec. Lines* v. *Empire City Subway*, 235 U. S. 179, *supra; Russell* v. *Sebastian*, 233 U. S. 195, *supra; American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Brooklyn Bus Corp.* v. *City of New York*, 274 N. Y. 140). "When the state through its legislature grants a franchise, privilege

or exemption to a corporation either in the act incorporating it, or by other legislation followed by action of the corporation under or in reliance upon the grant so made, it constitutes a contract, based on a valuable consideration, the obligation of which cannot be impaired by subsequent legislation." (*People ex rel. New York Cent. & H. R. R. R. Co.* v. *Mealey*, 224 N. Y. 187, 196-197, affd. 254 U. S. 47.) That rule is directly applicable here. The principle—that subsequent legislation cannot take away rights promised by prior legislation, especially after the promisee has acted in reliance upon the promise—protects respondent. Legislation by the State which violates section 10 of article I of the United States Constitution is violative of the due process clause of section 6 of article I of the State Constitution (*Central Sav. Bank* v. *City of New York*, 280 N. Y. 9, cert. denied 306 U. S. 661).

Hence the offer, accepted and acted upon, brought into existence an irrevocable contract. The inviolability of contracts, and substantive due process, require the enforcement of the contract.

The order of the Appellate Division should be affirmed.

Judges Van Voorhis and Foster concur with Judge Fuld; Judge Dye concurs in a separate opinion; Judge Froessel dissents in a separate opinion for modification; Chief Judge Desmond and Judge Burke dissent in separate opinions for affirmance.

Order reversed and matter remitted to Special Term for further proceedings in accordance with the opinion herein, without costs.

Exhibit B

Order and Remittitur of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 23rd day of March in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 23, 1961

In the Matter of the Application
of
ROOSEVELT RACEWAY, INC.,
Respondent,
for an Order
vs.
GEORGE P. MONAGHAN, as Commissioner of Harness Racing and constituting the State Harness Racing Commission,
Appellant.

BE IT REMEMBERED, That on the 25th day of August in the year of our Lord one thousand nine hundred and sixty, George P. Monaghan, as Commissioner of Harness

Racing and constituting the State Harness Racing Commission, the appellant in this cause, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Roosevelt Raceway, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by Rosenman Goldmark Colin & Kaye, and George Morton Levy, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Paxton Blair, of counsel for the appellant and by Mr. Samuel I. Rosenman, of counsel for the respondent, and by Mr. J. Clement Johnston, of counsel for the amicus curiae St. Clair, and by Mr. Samuel Gottlieb, of counsel for amicus curiae Yonkers Raceway, Inc., brief filed by amicus curiae Citizens Union, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according

to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, March 23, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

[SEAL]

Exhibit C

THE 1956 LAW

Section 45(a) of the Pari-Mutuel Revenue Law, L. 1956, c. 837, as am. L. 1957, c. 447*.

1. The legislature hereby finds that the physical plant and capital structures of some of the harness race tracks in the state have become depreciated and inadequate for the proper conduct of harness horse race meetings; that, as a result, the number of admissions to harness horse race meetings in the state and the sums deposited in pari-mutuel pools therein have been limited and the state has lost substantial revenues and income which would accrue from increased admissions and the deposit of larger sums in pari-mutuel pools; and that enlargement and modernization of plant and structures of such tracks in this state would result in increased admissions and larger sums being deposited in pari-mutuel pools and would, therefore redound to the financial benefit of the state and to the comfort, safety and convenience of its citizens. In order to remedy such situation and facilitate the enlargement and modernization of plant and structures in existing tracks and the construction of adequate and modern plant and structures in future tracks, this legislation is enacted.

2. Definitions. As used in this section:

(a) "Harness race track" is any association or corporation authorized under this chapter to conduct pari-mutuel betting at a harness horse race meeting on races run thereat;

(b) "The breaks" are the odd cents over any multiple of five calculated on the basis of one dollar and otherwise payable to a patron;

(c) "The base tax of an existing harness race track" is an amount equal to the total tax paid by it to the state tax commission in the calendar year nineteen hundred fifty-five for the privilege of conducting pari-mutuel betting at races run at the harness race meetings held thereat

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* The only changes made in Section 45(a) by L. 1957, c. 447 were amendments to subdivision 9(b).

and the "Base tax of any future harness race track" is an amount equal to the highest tax paid by it in any of the first five calendar years of its operations for the privilege of conducting pari-mutuel betting at races run at harness race meetings held thereat;

(d) "Capital improvement" is any kind of improvement of a capital nature to the land, physical plant or structures now or hereafter owned or leased by a harness race track which is used or is to be used by it in connection with the conduct of harness horse race meetings and shall include, but shall not be limited to, the destruction of any existing structure, the addition to any existing structure, the erection of any new structure and any site improvements in any existing or future track provided, however, that it shall not be deemed to include the purchase price of any land.

3. The provisions of section forty-five of this chapter shall apply to any future harness track until it has completed five calendar years of operation. However, for each existing harness track and for each further harness track after it has completed five calendar years of operation, the provisions of section forty-five-a shall apply instead of the provisions of such section forty-five.

4. Every such harness race track shall distribute all sums deposited in any pari-mutuel pool to the holders of winning tickets therein provided such tickets be presented for payment before April first of the year following the year of their purchase, less fifteen per centum of the total deposits plus the breaks. Of the sum so retained in any calendar year, an amount equal to five per centum of the amount of the total daily pool not exceeding one hundred seventy-five thousand dollars, seven per centum of the amount of the total daily pool in excess of one hundred seventy-five thousand dollars but not in excess of three hundred thousand dollars, eight per centum of the amount of the total daily pool in excess of three hundred thousand dollars but not in excess of four hundred thousand dollars, nine per centum of the amount of the total daily pool in excess of four hundred thousand dollars but not in excess of five hundred thousand dollars, ten per centum of the amount of the total daily pool in excess of five hundred thousand dollars but not in excess of six hundred thousand dollars, and eleven per centum of the amount of the total

daily pool in excess of six hundred thousand dollars plus fifty per centum of the amount of the breaks shall be paid by such harness race track to the state tax commission until the total of its payments to the state tax commission for the calendar year equals that proportion of its base tax as the number of days theretofore raced and to be raced thereafter in said calendar year bears to the number of days raced in the calendar year nineteen hundred fifty-five. The balance of such retained amount shall be disposed of as provided in subdivision five of this section.

5. (a) Every such harness race track which in any calendar year pays to the state tax commission an amount equal to the proportion of its base tax specified in subdivision four of this section shall in such year open a special account in its own name followed by the words "construction account" in a bank subject to the jurisdiction of this state and thereafter shall deposit therein, out of the sums retained from any pari-mutuel pool, one-half of the amount determined by the same percentages of such pool set forth in subdivision four of this section which it had theretofore in such year paid to the state tax commission and it shall pay the other half of said amount so determined to such commission.

(b) Information as to the moneys deposited by such harness race track in such construction account shall be transmitted by it to the state harness racing commission at such regular intervals as the state harness racing commission may require and shall be accompanied by a report under oath showing the total of all such deposits in said construction account, together with such other information as the state harness racing commission may require.

6. On or before December thirty-first in each calendar year:

(a) (1) If the harness race track has not completed capital improvements with the approval of the state harness racing commission as hereinafter in subdivision seven of this section provided, or if, having completed capital improvements with such approval, it has ceased to be entitled to the payments from the construction account as hereinafter in subdivision ten of this section provided, it shall pay all sums in the construction account in its name to the state tax commission.

(2) If the total payments, including those in subparagraph (1) of this paragraph (a) of this subdivision six, by all existing harness race tracks to the state tax commission for the privilege of conducting pari-mutuel betting for the calendar year were less than the total base tax (the amount by which same is less being hereinafter in this section referred to as the "difference"), each harness race track which has moneys deposited in a construction account in its name shall pay therefrom to the state tax commission such a proportion of the difference as the amount of moneys in its construction account bears to the amount of moneys at that time in all harness race track construction accounts in this state. The state harness racing commission shall give reasonable notice to each such harness race track of the amount so to be paid by it out of its construction account to the state tax commission.

(b) So much as remains undistributed in each construction account after the payments provided for in paragraph (a) of this subdivision six shall be transferred by the harness race track to its own general funds if said harness race track shall have completed capital improvements with the approval of the state harness racing commission as hereinafter in subdivision seven of this section provided and if it shall not have ceased to be entitled to payments from its construction fund as hereinafter in subdivision ten of this section provided.

7. Any harness race track may apply to the state harness racing commission for permission pursuant to the provisions hereof to make one or more capital improvements. The state harness racing commission shall determine whether a proposed capital improvement will ultimately add to the revenues of the state, will improve racing in this state, and will promote the comfort, safety and convenience of the public and, on a finding in the affirmative, shall issue its permit that such improvement be constructed under the provisions of this subdivision. The state harness racing commission shall, on application by any harness race track, make a finding as to the date when, if any, such capital improvement was completed and, if it was completed, the cost thereof.

8. Funds in a construction account shall be held by the harness race track not as public moneys but solely for the purpose of making the distribution as provided in this section.

9. (a) All payments provided in this section to be made to the state tax commission shall constitute a reasonable tax by the state for the privilege of conducting pari-mutuel betting on races run at harness race meetings held by harness race tracks, which tax is hereby levied. Except for the payments to the state tax commission provided in paragraph (a) of subdivision six such tax shall be paid to the state tax commission at such regular intervals as the state tax commission may require. The balance of the moneys from the pool and the breaks may be held by the harness race tracks for their own use and purposes.

(b) Payment of all taxes imposed by this section shall be accompanied by a report under oath showing such information as the state tax commission may require. A penalty of five per centum and interest at the rate of one per centum per month from the date the report is required to be filed to the date of the payment of the tax shall be payable in case any tax imposed by this section is not paid when due. If the state tax commission determines that any moneys received under this section were paid in error, it may cause the same to be refunded without interest out of any moneys collected thereunder, provided an application therefor is filed with it within one year from the time the erroneous payment was made. Such taxes, interest and penalties when collected, after the deduction of refunds of taxes erroneously paid, shall be paid by the state tax commission into the general fund of the state treasury.

10. The payments provided in paragraph (b) of subdivision six of this section to be made from the construction accounts to harness race tracks shall be made only to such a harness race track which completes one or more capital improvements with the approval of the state harness racing commission and then only from the date of the completion of any capital improvement with the approval of the state harness racing commission until such date as the amounts paid to such harness race track from the construction account, less income taxes paid thereon to the United States by such harness race track, equals the cost of the capital improvement as determined by the state harness racing commission. The capital cost of improvements shall not be deemed to include interest on indebtedness, real estate taxes or insurance premiums. In determining the amount of taxes paid by any such harness race track to the United States in any calendar year it shall be deemed that said

amounts were taxed at the highest rates actually paid to the United States by such harness race track for the particular year involved.

11. Except as otherwise provided in chapter one hundred forty-eight of the laws of nineteen hundred fifty-two, entitled "An act to enable certain counties and cities to impose a tax on admissions to harness horse race meetings and providing for the collection and administration of such tax," as amended, no county, city, town, village or other political subdivision of the state may impose, levy or collect a tax on admission fees or tax on admission, on wagers made by patrons in the form of purchases of pari-mutuel tickets or upon such tickets, on pari-mutuel pools, on breaks, on dividends or payments made to winning bettors, or on that part of the pari-mutuel pools or breaks to be retained by harness race tracks under this subdivision.

12. The state harness racing commission may adopt rules and regulations to effectuate the provisions of this section. L. 1940, c. 254, § 45-a, added L. 1956, c. 837, § 1; amended L. 1957, c. 447, § 5, eff. April 12, 1957.